

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 133

MAJOR RAYMOND LISENBA, (ROBERT S. JAMES),
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF
CALIFORNIA.

PETITIONER'S BRIEF.

MORRIS LAVINE,
Counsel for Petitioner.



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PETITIONER'S BRIEF.

*To the Honorable Charles Evans Hughes, Chief Justice
of the Supreme Court of the United States, and to the
Honorable Associate Justices thereof:*

This Court granted certiorari in *forma pauperis* to Major Raymond Lisenba, known as Robert S. James, from a judgment and sentence of death for the alleged murder of his wife, Mary Emma James, by drowning, pronounced in the Superior Court of the State of California (R. 1140).

A.

This is an appeal from the Supreme Court of the State of California. The facts and opinions in the court below are found in 14 Cal. (2d) 403, 94 Pac. (2d) 569, and in 89 Pac. (2d) pp. 39 to 108.

B.

Jurisdiction of this Court was invoked under the 14th Amendment to the Constitution of the United States and under Section 237c of the Judicial Code, 43 Stat. 936, 938, 28 U. S. C. A. Section 444c. This Court granted certiorari October 28, 1940.

C.

The Facts.

On August 5th, 1935, Major Raymond Lisenba, who is generally referred to in the record under the name of Robert S. James, which he took early in life, was, at about the dinner hour, returning home accompanied by two guests, Viola Lueck and James Pemberton, to have dinner with his wife (R. 2, 994). Mrs. James was pregnant at the time, so Mr. James stopped at the market on his way home and bought some soft foods for his wife, in the event she could not eat the steaks. James told the Pembertons that his wife had the vegetables ready (R. 3; R. 995).

James closed his barber shop at seven thirty, and arrived in due time with Mr. Pemberton, whom he had picked up on the way to meet Viola Lueck, who subsequently became Mrs. Pemberton, and these three drove in James' car to a market where James bought steaks and some cottage cheese. Arrangements for this dinner had been made previously by Mrs. James and Viola Lueck.

Mr. Pemberton and Miss Lueck were engaged to be married during the period of time immediately preceding Mary's death, and it had been arranged that the wedding was to take place at the James home. A relation of cordiality and friendship existed between James and his wife on the one hand, and Mr. Pemberton and his intended bride, on the other. Mutual social relations existed between the two couples, and exchanges of social courtesies were quite fre-

quent. The James home was pleasantly situated and was built in cottage fashion at 1329 West Verdugo Road, La Canada, County of Los Angeles. The yard was planted with garden grasses and contained shrubbery, flowers and a few orange and fruit trees. A lily pond occupied a part of the front yard. Cement walks led to and around the pond and walk-ways meandered around the gardens. A garage, a chicken pen, in which some four dozen chickens were kept, and a yard in which three dogs were kept, constituted the rear of the premises. The house was located in an attractive sylvan district (R. 994).

Mr. Pemberton and Miss Lueck had visited Mr. and Mrs. James on Wednesday evening, July 31st, five evenings prior to the finding of Mrs. James' dead body. At that visit the celebration of the Pemberton-Lueck wedding was discussed. It was arranged on that evening that the Jameses were to take dinner with Miss Lueck and Mr. Pemberton at the apartment house where Miss Lueck was living on Monday evening, August 5th, provided Mrs. James, who had been suffering from the symptoms of pregnancy, was able to come to Los Angeles. If not, they were to dine at the James' home (R. 13). About two o'clock Monday afternoon, August 5th, James called up Miss Lueck at her apartment, and told her that Mary was not feeling well enough to come to Los Angeles and asked her and Mr. Pemberton to come out to his home for dinner. He said that he would meet her in front of the telephone office where she worked at 7:30, after he closed his barber shop (R. 994).

The three, James driving, arrived at the James' cottage at 8:10 or 8:15 o'clock in the evening (R. 995).

James drove into the driveway at the back of the house and parked. Both witnesses, Miss Lueck and Mr. Pemberton, testified that James' conduct and appearance were usual and entirely normal (R. 31).

There were no lights in the house and the doors were unlocked (R. 22). All the parties entered the house through the rear door. They looked through the rooms and Mr. James and Miss Lueck called Mrs. James a number of times. Someone suggested that she might have fainted on the grounds. (She was six weeks pregnant, (R. 93, 791) and suffered from dizziness, and the usual characteristics of pregnancy) (R. 408). James suggested that a search be made of the yard and he got a flashlight. The fish pond in the yard contained water about fourteen inches deep. In Pemberton's search about the grounds he followed a narrow walk which led through the shrubbery to the side of and skirted the fish pond. At this point he discovered Mrs. James' outstretched body (R. 994-995). The lower limbs were resting across the narrow cement walk which was close to the water's edge, and her head and upper part of her body extended into and was submerged beneath the surface of the water, her face facing downward. He made an exclamation and went to the rear of the house to meet Mr. James. Pemberton told him Mrs. James was dead. He attempted to prevent Mr. James from going to where the body lay, but he was unable to do so. James knelt down beside the body and tried to lift her from the water but was unable to do so, and Pemberton assisted him in pulling the body back so that the head was clear of the water. Pemberton finally got Mr. James up and he had Miss Lueck take James into the house. Pemberton left to notify the sheriff's office at Montrose. Mrs. James was described by Pemberton as wearing pajamas. Miss Lueck also said she had on pajamas and bedroom slippers. The light wire fence which enclosed the rather shallow pond was crushed at the point where the body had lain. The pond was approximately twelve or fourteen feet in dimensions and the water was from ten or twelve

to sixteen inches in depth, the bottom being covered with cement (R. 996).

Miss Lueck testified that James was moved to tears and kept repeating, "Oh, I am so sick; what will I do without her." He was deeply grieved and was taken to a couch in the yard where he was prostrate for some time. A physician who had been summoned to the home administered to Mr. James. He was afterwards taken to the place where Miss Lueck lived and given such care as his condition required. Miss Lueck and Mr. Pemberton testified that his grief had all the appearance of being genuine and not simulated. The testimony is to the effect that James was kind and affectionate in his treatment of his wife and both seemed happy in their marital relations (R. 996). The home was pleasantly appointed and the grounds are described as being exceptionally beautiful.

Miss Lueck discovered in a dish or bowl on a table in the dining room, a sealed blue envelope addressed in pencil to Mrs. James' sister, Mrs. R. H. Stewart, Las Vegas, Nevada. She called Mr. James' attention to it and he requested her to open it. The letter was written in pencil on blue stationery, corresponding to the envelope, and was in the following words:

"Dear Sis.

"Just a line this morning to let you know I am pretty sick. My leg is all swollen, something bit me while watering my flowers this morning. I cut my toe yesterday and having lots of bad luck, this is old blue Monday, but my daddy will be home early to nite and he takes good care of me.

"Be sure and write me soon and I'll let you know how I get along. Sis" (R. 997).

The letter is concededly in the hand of Mrs. James.

The Cause of Death—Drowning.

Following the discovery of the body the sheriff's office was notified and two deputy sheriffs came to the house. The body was taken to the coroner's office, placed on a slab, and later embalmed.

On August 6th, some time in the afternoon, Dr. A. F. Wagner, Coroner's Physician, performed his autopsy. He gave the cause of death as DROWNING. He stated that on opening the body he "found the lungs containing a considerable amount of water." There was no disease of any of the vital organs. The autopsy showed a normal pregnancy of about six weeks (R. 93, 792). Superficial bruises of varying extent were found on the various parts of the body. A chemical analysis of the stomach, liver and kidneys was made, but no poison was found (R. 93). He also stated that he "found a laceration on the under surface of the left great toe. The left foot was considerably swollen." While on direct examination he described the cause of death as drowning, and added that the "contributing cause of death was cellulitis" because of the condition of the left foot (R. 94).

His testimony regarding the drowning is as follows:

"Q. I BELIEVE YOU STATED THAT IN YOUR OPINION THE CAUSE OF DEATH WAS DROWNING?

"A. YES, SIR (R. 101).

"Q. And will you just tell the jury why you fix drowning as being the cause of death?

"A. Well, these lungs were more filled up with water than we usually find even in drowning, that is, in the usual cases of drowning. The lungs were filled up, practically, with water, and in such a case, of course, that causes death.

"Q. As I understand it, the lungs are a spongy matter that expand and contract as we take in a supply of air?

"A. Yes, sir.

"Q. That is one of their principal functions?

"A. Yes, sir.

"Q. Taking in the oxygen which is necessary for combustion in the body?

"A. Yes.

"Q. And when a person's lungs become filled with water, the air is cut off by the water?

"A. Yes, sir.

"Q. The water is taken into the lungs by the movement of the lungs in contraction, is that right?

"A. That is right.

"Q. So that, if the body were already dead, you wouldn't expect to find water in the lungs? You wouldn't expect to find water in the lungs?

"A. No, sir.

"Q. Those are the facts and the process of reasoning upon which the death was caused by drowning?

"A. Yes, sir" (R. 101-102).

ON FURTHER CROSS-EXAMINATION DR. WAGNER, IN EXPLANATION OF HIS COMMENT THAT "CELLULITIS WAS A CONTRIBUTING CAUSE," STATED:

"I MEAN THAT THE DROWNING WAS SO COMPLETE THAT WE WOULD PUT IT DOWN AS THE CAUSE OF DEATH WITHOUT CELLULITIS, BUT I THINK THIS CELLULITIS BEING PRESENT IT WOULD NATURALLY HAVE TO BE ADDED AS A CONTRIBUTING CAUSE" (R. 408).

Dr. Wagner said he could not tell whether the single puncture wound on the great toe was produced by a rattlesnake fang, a dog's tooth, a needle or a sharp pointed article that was different from a fang, and he could not make any distinction as to whether the cellulitis was caused by animal poison or bacteria (R. 103). Animal poisonings include such things as *ants*, snakes, scorpions, tarantulas, spiders, gila monsters, and everything of that sort (R. 104). He said it would be impossible to distinguish between animal

poison and bacteria as a cause of cellulitis (R. 104). He testified that there was a single laceration on the underside of the great toe; that he had never been bitten by a rattlesnake, nor had he ever seen anybody bitten (R. 99). There was a puncture wound about a quarter of an inch (R. 99).

Experts testified that a rattlesnake has two fangs located in the upper portion of its mouth, facing downward, and that when a rattlesnake bites it results in a double puncture, or laceration that presents a smooth surface. They further testified that the puncture of a rattlesnake is like the injection of a hypodermic.

Mrs. James was buried and the investigation of James did not commence until some months afterwards, and, after he had applied for the life insurance due him because of her death. The companies refused to pay and suits had to be commenced. It was after the commencement of these law suits that he became the special subject of a most intensive investigation, conducted by the district attorney, aided by a dozen or more investigators attached to that office, working in concert with certain members of the police department and the sheriff's office. The officers rented a house next door, installed a dictaphone and commenced an investigation. After they had listened on the dictaphone for a few days, without any evidence of any homicide, they took the defendant into their personal custody and held him in detention in a private residence without any authority of law.

The defendant was taken into custody on Sunday morning, April 19th, 1936, about nine o'clock, after the dictaphone connection had been installed and was in operation in his residence. Nothing, however, is shown in the record to the effect that anything came over this dictaphone of an incriminating nature relating to the charge of murder.

I.

The Third Degree—The Alleged Confession (R. 1056 et seq.).

The investigating squad actively engaged in the case consisted of J. C. Southard in command, Charles Griffen, Chief Assistant of the Bureau of Investigation, Deputy Sheriff Willard L. Killion, and investigators Everett Davis, Harry Dean, John S. Martin and Earl E. Kynette. All of said officers were working together in relays day and night in forcing the defendant into a confession.

A.

Appellant Taken to Private House Instead of Jail.

On Sunday morning, April 19th, 1936, James was taken from his home at 3886 La Salle Avenue, by Southard, Griffen and Dean, district attorney's investigators, to the private house next door, 3882 La Salle Avenue (R. 1056). There the dictaphone planted by the officers for spying purposes was explained to him. This was done for its psychological effect. Southard said he took "quite a crowd" with him at the time he and the officers took James to the house and exhibited the dictaphone apparatus to him. A number of newspaper men, District Attorney Buron Fitts, Deputy District Attorney Williams, Officers Scott Littleton, Everett Davis and Harry Dean were among those present.

James was then taken to the office of Lieutenant Morgan where he was questioned for more than an hour (R. 1056). He was next taken to the district attorney's office (Sunday morning) where he was examined at great length and was called upon to defend himself against grave charges made by the officers. He had neither counsel nor friends present. No one knew where he was in custody or that he was under interrogation.

The California law prescribes a place in which persons charged with crime may be detained (R. 1057). A private house located in a residential part of the city and not complying with the provisions of law which provide the purpose and use of county jails and their management, is not a place where persons charged or suspected of crime may be lawfully detained. It is a violation of the laws of the State of California (Penal Code, Section 1597, *et seq.*, Section 145).

B.

Seventeen Days Without Warrant or Other Legal Process.

In the instant case the defendant was held in custody seventeen days, during at least the first two of which he was held incommunicado in the private house, without the issuance of a warrant and without being taken before a body which had power to examine the offense with which he was finally charged, and contrary to the express provisions of the Constitution and statutes of the State of California (R. 1057).

Early in the confinement of the defendant Officer Southard, in charge of all the investigating officers, committed an admitted battery upon the defendant (R. 1058). He and Officer Griffen were "working on the defendant" when Southard struck him, according to the latter's admission, in the face or on the side of the head. Southard had been an investigator for eight years and was seasoned to his task. James testified that he was ruptured during the time he was held incommunicado by the officers. A doctor who had treated James before he was in jail, and who saw him afterwards, testified that he was not ruptured at the time he examined him outside of jail, but that he was ruptured when he saw him in jail.

The third degree given to James consisted of at first depriving him of sleep, while officers in relays of four hours

each questioned him continuously (R. 1060). Physical violence was later exerted upon him. After thirteen days and nights of unremitting questioning he was taken from the jail on Saturday, May 2nd, and questioned from early morning until late at night without food. He asked for his attorney, Mr. Silverman (R. 487). The district attorney said he could not be found. He asked for Mr. Parsons, another attorney in the case. The officers refused to send for him, saying it would take too long to explain the case to him (R. 488).

Asked if James was informed that a charge of murdering his wife was under investigation, Southard answered: "I believe not." Attorney S. J. Silverman, who had been James' attorney in civil matters for some time and had heard that an attempt was being made to have James indicted for the murder of his wife, and James himself, testified that Silverman had instructed James to decline to answer any questions bearing on the alleged homicide except when Silverman was present. At any rate, James refused to talk after he was asked the first few questions and, according to Southard, he told Fitts "to go to hell" (R. 468-469). They kept right on questioning him (R. 470). Mr. Williams, a deputy district attorney, Griffen, and several other investigators were present. Southard said it *could have been possible* that they told him they had the goods on him. The arrangement under which James was "worked on" was that he was placed in a large chair, where he was compelled to sit for forty-eight hours, according to the admissions of Southard and other investigators, but, on the showing in the record, the questioning must have continued for sixty hours. The investigators worked in pairs of four-hour shifts. From sheer exhaustion the defendant several times fell asleep. Never less than two and as many as eight or ten officers were plying the defendant with questions at all hours of the night. James testified that

on May 2nd, at ten o'clock at night everyone cleared the district attorney's office and left him alone with Southard, the officer in charge who had admittedly beaten him.

James testified as follows :

“ ‘A. I sat at the desk and he said to me, ‘You have been sitting here lying to Fitts all evening just like you lied to me when I had you out at the house.’ He said, ‘I didn’t have the dope on you then, but I have got it on you now’, and he said, ‘You are going to tell the truth here now or I am going to take you back to that house and I am going to beat your God-damned head off.’ Q. Did you make any answer to that? A. I told him that I was ill from the beating that I had taken before, that I wasn’t able to take another beating and that if he wanted me to say what he was relating to me in Hope’s story there that I would gladly admit it and save myself other punishment’ ” (R. 497).

C.

The Confession Breaks at 1:45 A. M. After Days of Questioning.

The alleged confession began to break after days of unremitting effort, at 1:45 o'clock in the morning (R. 1057). No one, not even Mr. Silverman, the defendant's attorney, or Mr. Parsons, had knowledge of the place in which the defendant was held in private custody by the investigators. Neither his friends, relatives nor the public knew the place of detention. No warrant of arrest had issued and there was no public record, or any record, which would enable anyone not a member of the staff of investigators to know of or discover the presence of defendant.

D.

No Counsel Present.

The defendant, without being represented by counsel of his choice, whose presence he had requested for the

interrogation (R. 484), was subjected to the inquisition, in which a number of the investigators took part, and which was vigorously and unremittingly pressed, without delay, through many days and hours (R. 491 *et seq.*) (R. 1057).

E.

Description of Admitted Battery.

Officer Griffen described the battery committed on James as follows (R. 1058-1059; R. 477): He said he and Officer Southard were "working" on the defendant when Southard struck James in the face or on the side of the head. He said they began their four-hour assignment of questioning at four o'clock Monday morning. Everett Davis was present. They had not met with anticipated success. Jack Southard said: "Your wife Mary was a very sweet girl, very nice woman; she was well thought of by her friends; seems to have come from a good family and it is a shame she had to die the way she did in this pool out there." James replied: "She was not very much. She was a whore when I married her." Officer Griffen said that Southard was sitting in a chair opposite to James and he reached over and slapped him. Griffen then said to Southard: "Take it easy, Jack."

James testified that he had told Southard and Griffen "a hundred times," as they repeated Hope's rattlesnake story and the murder of his wife to him and used violent means to compel him to adopt it, that he didn't know what they were talking about and that it was because of his refusal to affirm Hope's story that he was struck. Griffen said that after James was "slapped" they continued to question him but he had no other violence inflicted upon him. Griffen questioned him the next night until one o'clock A. M. During all the time he was being held incommunicado he did not see James sleep (R. 1059). James had then been

questioned, admittedly for forty-eight hours. There is evidence that it was longer. Griffen said James did complain about his ear, but he examined it and couldn't find anything wrong with it. When Griffen returned to the place of examination at nine o'clock, five other officers were with James. As 8:30 he was taken by Officers Kynette and Davis to Ninth and Alvarado streets. Griffen and Southard followed. At noon he was taken to the district attorney's office. Griffen did not recall whether James, when at the district attorney's office on the day he was taken into custody, had requested that word be sent to Mr. Silverman, his attorney, requesting his presence. He did not deny that this occurred.

On Tuesday he saw the defendant from seven o'clock to one P. M. At eleven o'clock he gave instructions to "book him" at the county jail, where he was committed to the "High Power Tank."

F.

Officers Work in Relays (R. 1057).

Southard admitted that the investigators operated in relays of pairs for a period of forty-eight hours. The defendant sat in a chair and was not allowed to remove his clothing (R. 1060). Several times he fell asleep from fatigue and exhaustion. Southard's statement as to what he said to James about his wife being such a beautiful little girl, etc., was given in the same words as Griffen's story. James' reply, being somewhat different in substance, we repeat it: "'Aw, leave me alone and quit questioning me about her. She wasn't so much before I married her. She was only a little whore before I married her,' and I lost my temper and slapped him."

The defense contended that no such words were ever uttered by James at any time with respect to his wife and

and it was solely Southard's disappointment in failing to have broken James down by harassment, coercion and physical violence, to the state of accepting Hope's sensational story (which was a composite product of the detectives and investigators in collaboration with Hope) which irked Southard to the point of physical violence. Several disinterested witnesses and one or two officers testified absolutely that James' face showed black and blue and swollen spots which were plainly visible for several days after his arrest (R. 1060-1061-1062). He testified to terrible beatings he received in the private house in which he was detained and that his body was made black and blue from the waist up and that he had suffered a hernia or rupture from the roughing which he passed through. A physician who had examined his abdomen five months prior testified that he had observed no evidence of hernia at that time but an examination since his arrest clearly disclosed the existence of a hernia.

The late Mr. Justice Seawell of California, in his dissenting opinion, said (R. 1061 *et seq.*):

"The prosecution called a few witnesses connected with the official staff who testified they did not observe any bruises on the defendant's face, but, in the main, their testimony was more in avoidance of direct and positive answers which should have been given by officers of the law. There can be no possible doubt, as testified to by one or two of the officers themselves, and by independent parties, that the defendant's ears bore marks and bruises which anyone at all observant should have seen. James said he was practically made hard of hearing by the head beating he had received from Southard and Griffen, and that his body was black and blue from the waistline upwards. Despite the admissions of the several officers who were most active in conducting the plan of continuous questioning, that James fell asleep several times while being quizzed, from sheer fatigue and exhaustion, nevertheless sev-

eral of said officers testified, as astounding as it seems, that James was at all times exceptionally cool and calm and showed no signs of mental distress or fatigue, and was actually *in better physical condition than any one of his inquisitors*. And this, too, in spite of the fact that the questioners worked in pairs on four-hour shifts while James admittedly was carried through a sleepless ordeal of not less than forty-eight hours, but more probably sixty hours, with as many as eight or ten investigators plying him with questions. As example of the evasiveness which characterized the testimony of the investigators generally, we quote from Jack Southard, acting chief of inspectors, as to James' physical appearance at the time of private custody by said officers, to the proper place of detention, the county jail. 'Q. Did you notice any marks or bruises upon his face or head when he was taken into custody? (delivered into legal custody at the county jail.) A. Not that I *recall*. Q. Well, you did notice marks and bruises upon his head when you took him to the county jail, didn't you? A. No, I don't *believe so*. Q. Weren't both of his ears bruised and swollen at that time? A. *They were not*. Q. Neither *one of them*? A. That I *wouldn't say*; one may have been; I *wouldn't be positive*. I know that *both* were not. Q. As a matter of fact you know that one was, don't you? A. I do not. I saw that one in court. Q. You saw the bruises here when he was in court? A. The left ear was a little bit swollen at the top. * * * Q. He was pretty well worn out when he got to jail, wasn't he? A. I couldn't tell you.' (Emphasis supplied.) He fixed the time he observed the bruises he was then testifying to as of the day he was before the grand jury on the incest charge. The foregoing equivocal testimony as to bruises that were visible on the defendant's body is characteristic of the testimony of the officers in whose personal custody the defendant was held for approximately two weeks. Why he was thus held incommunicado has not been and cannot be accounted for by any theory, except the practically admitted one of forcing the defendant, by the use of physical and intense men-

tal punishment, into making a confession corroborating the unnatural, weird and astounding statement which was in the hands of the investigators and commonly referred to as Hope's story or confession. On cross-examination Southard was asked these pertinent questions to which objections were sustained on the ground that they were immaterial: 'Q. Now, Mr. Southard, when you arrested the defendant why didn't you take him before a magistrate? (Objection sustained.) Q. The reason you didn't take him before a magistrate at once was because you wanted to get a confession from him, wasn't it? (Objection sustained.)' Southard said he gave instructions that James was not to be left alone at any time; one or more investigators was questioning him at all times; some questions he answered and some he refused to answer; he would just sit and look blankly. Southard testified that he had three meals a day but James testified that he was practically starved into a state in which he told the investigators that he would answer any question in any way that the investigators wanted him to answer it. It is the admitted fact that he was interrogated by the district attorney and his assistant, Mr. Williams, at all hours of the night, for as many as two and a half to three hours. One period continued from one o'clock to six o'clock. The officers also took part in interrogating the defendant. The plan adopted was that the investigators worked on the defendant to a point where it was deemed expedient or advisable to take him before the district attorney, and if satisfactory progress had not been made he would be returned to the private custody of the investigators for the employment of such methods as would work a change of mental attitude on the part of the defendant. No other possible answer could be made to their unauthorized action which only ended with the procurement of the alleged confession. At times numerous officers would be present and sometimes, James testified, he was left with but one officer. The evidence adduced by the prosecution affirmatively shows that the defendant was shifted back and for-

wards in the manner herein described many times at all hours of the day and night, continuing over a long inquisitorial period. At times Hope was brought into the room, and engaged James in controversial disputes.

"Officers Killion, Gray, Griffen, Littleton, Davis and Southard were most active in procuring the alleged confession of James. The first signs of a confessional collapse, as told by Killion, occurred at midnight, May 2nd, thirteen days after James was taken into custody. At the above hour, in the room adjoining the district attorney's office, James said to Killion, 'Why don't we go out and get something to eat, and I will tell you *the story*.' The conference began at about one in the afternoon and ended at about 2:30 or three o'clock the following morning—a short intermission having been taken for coffee and sandwiches. The reference to 'the story' explains the purpose uppermost in the minds of Killion and Gray and accounts for James being in their exclusive custody at the midnight hour instead of being in jail. Killion's reply to James' proposition was, 'All right.' Killion and Gray then took the defendant to a restaurant at 5th and Figueroa. Killion said he once wrote shorthand. The notes he used to refresh his memory were, to use his words, 'some in shorthand, and some in longhand, and some in scribbling.' They seemed to have been entered in desultory order in a book and covered thirty-one pages, all of which he said he took during the time he and Gray had James at the restaurant. They had a steak dinner and Killion bought James a cigar and James said, 'Now, you want to have this story,' and Killion said 'Yes.' James said, 'All right; there is no hurry, is there?' Killion wanted him to go back to the office (where the district attorney, his deputies and the investigators were waiting) but James said, 'No, this is all right, isn't it?' Killion replied, 'Sure, it is all right.' James testified at the trial that practically everything he told Killion, Southard and the district attorney concerning the death of his wife was the story which the investigators had drilled into him for hours for several days. He said he was not able to stand

further beatings and physical punishment with which he was threatened; that if he gave an answer to a question which did not suit the questioners he was struck on the head. He had also received one or two terrific beatings at the hands of Southard and Griffen; he would have preferred death rather than be returned to the private residence, which the officers threatened to do, where most of the punishment was inflicted. The story he told Killion had been repeated a 'thousand' times to him; for days when they repeated to him Hope's story he told the officers that he did not know what they were talking about until he was finally coerced into submission.

"James said he was not beaten or struck in the presence of the district attorney or his deputies, but when he was taken back to the private place of detention, without the hearing of any person save his accusers, he was beaten when he refused to answer, and also for refusals to give answers which were not acceptable to his questioners. Southard admitted that in the early stages of his confinement he refused to answer certain questions. In fact Southard said he told Mr. Fitts on one occasion to 'go to hell.' * * * he changed his mind after spending two days in private detention and the balance of the time in the 'High Power Tank.'

"We now come to the proceeding in which it is claimed that James admitted or affirmed the truth of Hope's story by failure or refusal to deny the same under the well-known rule that where one is directly charged with the commission of a crime silence on his part or failure to deny the accusation may be received in evidence against him.

"On May 2nd, at 11:45 a. m., the defendant was taken into the 'Chaplain's' room at the county jail and Hope's confession or statement was read to him. Mr. Lynch, the statement reporter of the sheriff's office, reported the full proceeding. James was brought into the room by Officer Killion. Mr. Williams, Deputy District Attorney, was seated directly opposite James

at a table about three and a half feet in width. Officers Southard, Griffen, Killion and Gray were seated across the table from James. Hope was also present. The reporter's notes do not show that the defendant was advised by anyone as to his rights and no showing was made that he was not under duress or as to what was done or said by way of inducement or fear of punishment immediately prior to the statement. Hope was present and the proceedings were begun by Mr. Williams asking the defendant the following question: 'Q. James, do you know this man, Chuck Hope? A. Yes, I know him. Q. Now, Chuck Hope told us this morning that on the 4th day of August, the day before your wife was killed, etc. (Here follows two pages of a summarization of Hope's accusatory statement which was read to the defendant.)' At the conclusion of the statement Mr. Williams added: 'He makes that statement. Have you got anything to add to it?' By Mr. James: 'A. Nothing—that is all.' "

The late Mr. Justice Seawell of the California Supreme Court added:

"It certainly would require a reversal of the cardinal rules of criminal law that all inferences and presumptions and intendments of law are to be resolved in favor of innocence, to hold, in the face of James' experiences as shown by the record, that a failure of the accused to *add* to the accusations made by Hope should be taken as an implied admission of guilt. The defendant had been confronted with the accusations of Hope at every hour of the day and night for several days and he refuted them until he finally yielded at the midnight supper. Would the average person have done otherwise than to have refused to attempt to *add* to Hope's story of monstrous deeds? In all fairness, should not James have been advised as to the legal effect of his failure to add anything to Hope's story?

"It will be noted that the statement to Killion and Gray was not taken in stenographic form. Killion said

he took it in shorthand, longhand and by 'scribbling.' It is in narrative form and bears no semblance to a stenographic report and is in the third person. When immediately taken before the district attorney no effort was made to advise defendant of his rights. In fact it is admitted that he requested that one or both of his attorneys be communicated with. If either or both were not available at the particular time, it was sufficient notice to the prosecution that the defendant was asserting his statutory rights which could not be nullified by unduly hastening an inquisition not provided by law. It is always the duty of the law's representatives to give all reasonable assistance to the enforcement of an accused's statutory rights.

"It may be noted that during the period of intense questioning which continued throughout several days, no statement reporter was present to report the methods by which the confession was attempted to be induced. It is the claim of the defense, and ample evidence supports the contention that the alleged confession followed a long course of deprivation and physical mistreatment of a prisoner held incommunicado. It was only when the time was deemed ripe for a confession that a reporter was called to report the proceedings and in no instance were the preliminary things done and said which caused or forced the alleged voluntary confession, made to appear as a part of the report. These important matters, so far as referred to at all, rest in parole. Neither was the defendant properly advised as to his rights or permitted to have independent advice or counsel at the times when the exercise of such rights would have been of benefit to him. The law casts the burden upon the prosecution to show that the confession of guilt was freely and voluntarily made without the exercise of duress, fear, force, or physical or mental cruelty, or hope of reward, or immunity from punishment.

"It is true that several officers testified in terms of conclusions that no violence was inflicted upon the de-

fendant or promises of immunity were made to him in their view or to their knowledge, but this does not meet the situation. Some were not called to testify and others may not have been present at the times physical punishment was used. From the record before us the conclusion is irresistible that unlawful means were employed by concert of action from the first to the time defendant made the alleged Killion statement to force a confession. The burden cast by law upon the People was not met. The case of *People v. Dye*, 119 Cal. App. 262, 269, 273, is directly in point here. Dye was convicted of murder of the second degree. The defendant, being suspected of murder, was taken into custody and confined in the Beverly Hills police station after the same fashion as the defendant here was held in custody by the officers at a private residence. Precisely the same kind of methods—though by no means as extreme—were adopted there to coerce a confession from the defendant as were adopted in the instant case. Mr. Justice Conrey, then Presiding Justice of the Second Appellate District, Division One, District Court of Appeal, was the author of the opinion which reversed the judgment of conviction and the order denying a new trial.

“In discussing the methods by which the confession was procured, the late Justice Conrey said in part: ‘It shows a persistent questioning of the defendant about various matters, many of which related to the tragedy . . . including a direct charge, which the defendant denied . . . During the night the defendant became weary and sleepy (in the instant case he became not only sleepy but fainted) but the questioning went right on. Officer Gray admitted that twice he told defendant ‘to sit up in his chair’; that the defendant ‘may have been nodding; he was not asleep.’ In view of the inquisition that was going on, and the condition of the prisoner, these orders were in effect a kind of coercion. The circumstances of the questioning and the method thereof, were well calculated to force a con-

fession of guilt, but the process was not at that time successful. It was only after six hours more of questioning * * * followed by three days more of secret imprisonment that the confession was finally obtained * * *. Considering the wearing-out process of inquisition, the secrecy of the imprisonment, the isolation of the defendant and the unlawful failure to take the defendant before the magistrate (Pen. Code, secs. 821, 824, 849 and 145) the transaction has all the earmarks of a deliberate attempt to force a confession by every means short of promises, direct threats or actual violence. (In the case at bar a direct act of violence in at least one instance is admitted. As to others the evidence is quite convincing.)"

At midnight on May 2nd, 1936, thirteen days after James was taken into custody, and unremittingly questioned in a room adjoining the district attorney's office, without his counsel being present, James said to Killion, "Why don't we go out and get something to eat, and I will tell you the *story*." The alleged confession was started about 1:45 A. M., and was not completed until 3:00 or 3:30 in the morning.

James was indicted on May 6th, three days later, and on May 11, entered a plea of not guilty to the charges. At no time subsequent to this midnight and early morning session, when he was in the exclusive custody of the district attorney and his deputies, and investigating officers, and without the presence of his counsel or any friends, did James ever repeat the alleged confession which was subsequently offered in evidence against him.

At the outset of the trial, which commenced on June 23rd, 1936, Charles H. Hope, represented by a public defender appointed by the court, entered a plea of guilty and his sentence was deferred until after this trial.

II.

The Bringing of the Rattlesnakes Into the Courtroom During the Progress of the Trial of the Case.

Hope received a lighter sentence as a result of his plea of guilty and his testimony against the appellant, which he has since repudiated and branded as false. He testified that he bought two rattlesnakes from "Snake Joe" Houtenbrink at Pasadena, which he delivered to the defendant, and that the defendant placed his wife's foot in the box containing a snake, while he, the defendant, held her foot with his left hand. The snake was supposed to have struck the great toe of her foot, which had on it but a single laceration. A snake has two fangs, as shown by the testimony of experts who testified fully and voluminously in the case.

"Snake Joe" Houtenbrink was put on the stand and while he was on the stand argument arose between counsel over the proposal of the prosecution to bring into the courtroom two snakes in two boxes. The objection was overruled. The snakes were thereupon produced in court, whereupon defense counsel made the following objections:

Defense Objections to Rattlesnakes (R. 200-204, et seq.)

"Mr. Clark: If the Court please, I object to the witness leaving the stand for the purpose of looking at the box that has been brought into the courtroom, or for any other purpose. I object to any snakes being exhibited or introduced into this case. I think this is an appropriate time for me to ask your Honor either by statement of your Honor or some appropriate means to make it appear in the record that two men have just entered the courtroom carrying a box covered with a burlap cloth, and upon their coming down the aisle, the people who were in the courtroom, filling the courtroom, manifested excitement, that several of them rose from their seats, that the attention of spectators and the jury were directed away from the testimony of the

witness, that at the time I am speaking there is upon the faces of the audience an appearance of anxiety and consternation not heretofore exhibited during this trial.

"The Court: The Court has no knowledge that there was such manifestation on the part of the audience. The Court is unable to state whether the attention of any person was diverted or not, nor is there anything to indicate the apprehension that your statement implies; at least, it has not been seen by the Court.

"Mr. Clark: In other words, your Honor has no knowledge that the statement I have just made is correct?

"The Court: No. That may be your frank, honest opinion as to the facts; however, the Court has not seen any such situation.

"Mr. Clark: I will try to find appropriate means of putting those facts in evidence. I think that they are facts and that my statement is appropriately made at this time.

"The Court: So far as the physical facts of the two men having taken the box in from the courtroom door and passed up the aisle between the two groups of spectators, through the gate into the inner part of the courtroom and deposited the box by the side of the bench, the record may show that that did occur."

Description of Wave of Terror on Bringing in of Snakes.

On motion for a new trial, R. E. Parsons and Wm. J. Clark, defense counsel in the case, filed the following affidavits describing the courtroom scene of the bringing in of the rattlesnakes (R. 822):

"R. E. Parsons, being first duly sworn, and upon his oath, deposes and says: That he is one of the attorneys in the above entitled matter and that as such he was present during the course of the trial of the above named defendant in Department 43 of the above entitled court and that upon one occasion during the course of the trial and while testimony was being

taken, affiant heard a commotion in the rear of the courtroom and upon looking up saw one of the investigators of the District Attorney's office of this County, and who had been working in and upon the preparation of this case and who, from time to time had been sitting at the counsel table during the trial of this case, entering the court room with another gentleman and the two of them were carrying a box, which box was approximately a foot square and about five feet long and one side was made of glass so that upon looking into the glass one could see the entire inside of the box, and there within the box, were two live rattlesnakes commonly known as 'diamond back', and affiant could hear the rattle of these snakes, notwithstanding the proceedings within the court room were then actually being carried on as these men entered the court room with the box containing the two live rattlesnakes.

"That there was considerable commotion within the court room and affiant as he turned about the court room, saw numerous people partially arising from their seats and looking in the direction of the two men who were carrying the box of live rattlesnakes within the court room; that affiant could hear numerous comments made by persons within the court room which remarks were, however, made in an undertone and affiant could not tell exactly what the spectators within the court room said, but affiant noticed the jury, immediately upon the entering of the court room by the District Attorney's investigator and the other man, who were carrying the box of live rattlesnakes directed their attention from the actual proceedings then taking place within the courtroom, and the eyes of the jurors were immediately centered upon the two men who were entering the courtroom with the box of rattlesnakes; that the box of rattlesnakes was taken to a position in the courtroom immediately behind the clerk's desk and the box was set down and at a later time this same box of rattlesnakes together with the two rattlesnakes therein contained, was offered in evidence by the People over an objection of the defendant, and thereupon said box of rattlesnakes, with the glass por-

tion thereof turned toward the jury, was placed upon the counsel table at a position approximately four or five feet from the front of the jury box, and affiant noticed that the attention of the jury was thereupon attracted to and centered upon the said live rattlesnakes which were then contained in said box and which were exhibited to the jury as aforesaid."

"Wm. J. Clark, being first duly sworn, deposes and says (R. 828): I am one of the attorneys for the defendant and was one of the attorneys that represented him at the trial of the above entitled cause. There was a strong public sentiment against him before the trial commenced. It was so strong that serious consideration was given to the question as to whether a motion should be made for a change of venue, when a jury was selected I suggested to Hon. Chas. W. Fricke that the jury be locked up during the trial but it was not so ordered and the jurors were not removed from contact with the public nor prevented from reading the papers except that they were admonished not to do so.

"All the daily papers, of which there were four, namely, the News, the Times, the Herald and the Examiner, carried daily stories unfavorable to the defendant and each day the court room was filled with an unfriendly audience, while from twenty to sixty persons were waiting in the corridors almost throughout the trial.

"There was the testimony of one Charles Hope that he had procured rattlesnakes at the solicitation of the defendant and the latter had thrust his wife's foot into a box containing one of them. As the testimony of said witness appears at length in the reporter's transcript it is not deemed necessary to quote from it here. He did say, however, that the snakes were returned to the man from whom he bought them.

"On the 29th day of June the District Attorney, acting through his deputies Eugene Williams and John Barnes, committed such misconduct as inflamed the passions of the jurors against this defendant and prevented him from having a fair trial.

"On said day the District Attorney, acting through said deputies, for the purpose of inflaming the minds of the jurors, caused to be brought into the courtroom the said two rattlesnakes. The said snakes were in a box which was carried down the aisle of the courtroom, every seat of which was occupied. The snakes were alive and sounding their rattles. A wave of terror—I can find no other language more accurate—swept through the courtroom. Spectators rose from their seats. Some nearest the aisle shrank away. Many uttered exclamations of fright.

Newspaper Description of Scene.

"The scene as described by a reporter of the Herald-Express was as follows (R. 828 829):

" 'Buzzing their hollow rattles so loudly that women in the crowded courtroom shivered and shuddered at the eerie, frightening sounds, two diamond-back rattlesnakes glittering in their new skins today were placed on the counsel table in Superior Charles W. Fricke's court, where Robert S. James, Birmingham barber, crouched ghost-faced and jittery at his trial for the murder of his golden-haired bride, Mary.

" 'Paraded across the courtroom in a velvet covered, venom splashed, 5-foot glass cage, two deadly diamond-back rattlesnakes late today hissed and shook their hollow rattles eerily, and struck out with their evil wedge-shaped heads, as they were exhibited less than 2 feet away, before the fascinated eyes of 10 men and 2 women who made up the jury trying Robert S. James for the murder of his golden-haired wife, Mary.

" 'The reptiles had just been identified by Snake Joe Houtenbrink as Lethal and Lightning, two guaranteed 'hot' snakes he had sold to Charles H. Hope, hard talking ex-sailor, the day before Mrs. James was slain by drowning in her bathtub in her La Canada home.'

"The Examiner reporter gave the following description of the scene (R. 829):

“ ‘Man’s enemy from primordial ages, the snake, yesterday was made the living, visible symbol of the Robert James murder case. The diamond-backed rattlesnakes hissed and struck before the trial jury as a long glass box was borne forward like a hideous offering of a black ritual.’

“I was standing with my face toward the jury at the time. I noticed some of them gave a kind of gasp almost at the moment I noticed the consternation of the audience. Some of the spectators, however, rose to their feet. Many of them made audible exclamations. Those nearest the aisle, shrank away. I made a protest at the time because of the obvious effect which the bringing of the snakes into the court room had upon the spectators who were there.

“I am informed and believe, and therefore state the fact to be, that the bringing of the rattlesnakes into the court room in the manner described had such effect upon the minds of the jurors as prevented them from giving fair consideration to the evidence thereafter introduced by the defendant. The source of my said information is a newspaper article containing alleged interviews with members of the jury, none of whom have publicly, or so far as I know at all, denied the statements attributed to them.

Jurors’ Views of Effect of Bringing in of Snakes.

“The said interviews were published in a daily newspaper of large circulation, to-wit: the Los Angeles Examiner, of July 25, 1936, and I quote from them as follows (R. 830):

“Harold W. Hart, one of said jurors, said:

“ ‘James had been convicted in my own mind ever since they brought the rattlesnakes into the courtroom, showed them to us, and then introduced witnesses who told us that James had actually stuck his wife’s foot into a box containing one of those serpents and had watched it strike her.’

"Mrs. Ollie Sype said:

"The sight of the rattlesnakes which were exhibited as the weapons by which Robert James did his wife to death stunned me. It was the most shocking experience of my life.' * * *

"Thereafter, the District Attorney, acting through his said deputies, committed further misconduct which prevented a fair trial of the cause. I am informed and believe that on the 15th day of July, 1936, during the noon intermission, one A. Pierce Artran was present in the court room at the request of the District Attorney. He did not testify in the case and was not sworn as a witness but during the said intermission, according to my said information and belief, he opened the box containing said rattlesnakes and was holding one with a forked stick, demonstrating to those who were present the mouth and fangs of said snake, when it escaped from him and slid under a bookcase in the court room, in which there were a large number of spectators. That the said snake was loose in the court room for a considerable period of time and was not returned to its box until nearly time for court to convene. The sources of my said information are the newspaper articles of July 15, 1936, and July 16, 1936, published in the papers above referred to. I also received information from the Clerk, Mr. Arthur Moore, casually, that one of the snakes had been out of the box, which information was a brief affirmative reply to a hurried question on my part. I was also so informed by my associate, Mr. Russell E. Parsons, who, as I understand, was not present, and received his information from others. And I was also so informed by a Mr. O'Brien, who is employed by Mr. Parsons, and I received similar information from a number of others. I was informed by Mr. O'Brien, and others whose names I do not now recall, that persons whom they thought they recognized as jurors passed through the courtroom during the time when the rattlesnake was out and before the excitement which it caused had subsided.

“The presence of the snakes in the courtroom proved nothing. They were not brought into the courtroom for the purpose of proving anything. There is no evidence as to one of them that it was ever in the vicinity of the deceased, Mrs. James; and there was no attempt to identify either one of them as the rattlesnake which it was claimed did strike Mrs. James. The snakes were produced for the effect that two live rattlesnakes—any two live rattlesnakes—would have upon the jury. Any other two rattlesnakes would have served the same purpose.”

Houtenbrink later was made a “clerk” of the court for the purpose of having custody of the snakes, which were labeled “Exhibit 20” in evidence (R. 212), and many experts were called to testify as to the life, habits and habitat of snakes, and experiments conducted on snakes by these reputed experts.

Eugene A. Williams, a deputy district attorney of Los Angeles County, trying the case, filed an affidavit which this counsel stipulated could be included in the records herein (R. 1116), in which Williams admits that two live rattlesnakes were brought into the courtroom, stating that they were brought in for the purpose of being identified and were identified as the identical snakes sold and delivered to the defendant Hope (R. 1116). The affidavit admits that “snakes were brought into the courtroom in a glass case covered with a cloth so they could not be seen, and were offered and received in evidence as soon as was conveniently possible after having been brought into court.”

The affiant denies that he brought the snakes into court “for the purpose of inflaming the minds of the jurors,” but states that they were brought into court and offered and received in evidence and that they “were instruments actually purchased for the purpose of killing the victim and one of which was actually used in an effort to do so.”

The affidavit further denies that to his knowledge there was "any wave of terror or exclamations of fright," and states, "nor was there any extraordinary or unusual commotion among the spectators, and none among the jurors. The only reaction of the audience observed by affiant was the natural curiosity caused by the rattling of the snakes and the desire of some of the spectators to see what was causing the sound. The entire matter of bringing the snakes into court and dealing with them in the presence of the jury was handled in as unostentatious a way as was possible, and affiant personally suggested that the snakes should be removed from the courtroom as soon as was reasonably convenient after they had been exhibited to the jury."

Deputy Williams further averred that he thought it was his duty to bring the snakes into the courtroom and exhibit them to the jury (R. 1117).

The affiant further states that one of the rattlesnakes was removed from its box during the noon hour, and that this was done at the request of the deputy district attorney in order to examine the mouth and throat of the snake for the purpose of determining its physical condition. The affidavit admits that this examination was in the courtroom, but denies that any members of the jury were present. It states that after the examination the snake was returned to the box in the courtroom.

One doctor, Dr. Gustave Boehme, testified to experimenting upon guinea pigs with the venom of two rattlesnakes, one of which it was claimed by the State, was one of those belonging to Houtenbrink (R. 109, 115).

III.

The Production of Evidence From Colorado Having No Bearing on This Case on Trial, Without Notice and Without Opportunity to the Defendant to Defend Against the Same.

During the trial of the case the prosecution, over strenuous objections (R. 257-263), produced in evidence a number of witnesses from the State of Colorado, more than one thousand miles away, to testify to the death of a former wife, Winona James, who was seriously injured in an automobile accident in 1932, when the defendant and she were riding down Pike's Peak Highway in Colorado (R. 263, 323, 338, 360, 377, 385, 391, 397, 447). The victim had not died from the injuries of the automobile accident, but was taken to a hospital, where she was treated and was conscious for three weeks, and where she made no complaint against the defendant. The hair of her head was matted with blood as a result of the accident, and she was warned, according to the testimony, not to bathe because of the danger of removing the matting. Nevertheless she did bathe and was found drowned in the bathtub. This testimony was offered and produced by the state for the purpose of showing that her death was not the result of accident, but was deliberately planned and executed by defendant to collect insurance. No connection was shown between that case and the case for which the defendant was placed on trial and convicted.

Over vigorous objections of the defense several witnesses were produced by the district attorney from the State of Colorado, and these witnesses testified to alleged events four years before. It was contended by the defense that the admission in evidence of the large amount of testimony from Colorado deprived him of due process of law in not

having notice that he would have to meet this evidence or being given opportunity to meet it.

During the taking of the testimony starting the Colorado matter defense Attorney Clark made the following statement to the Court and the following objections:

"We are in receipt of information that warrants the belief on our part that by taking depositions in Colorado Springs, Colorado, we can contradict some of the facts deemed material here, testified to by the witnesses for the prosecution, and particularly that we can contradict the testimony of Mr. J. D. Rogers concerning the apparently intoxicated condition of Mrs. James, and we move for a reasonable continuance to give us an opportunity to take the deposition of the witness who has communicated with us and such (fol. 1871) other witnesses as we may find at Colorado Springs
* * *" (R. 684).

Robert S. James, recalled on *voir dire* examination, and testified as follows:

(fol. 1872) By Mr. Clark:

"Q. Mr. James, I hand you a letter and envelope, and ask you if they came into your possession during the course of this trial?

"A. Yes.

"Q. And directing your attention to the envelope and the post mark, 'June 24th,' when, with relation to that date, would you say that you did receive that?

"A. I received it when I went back to my tank one day last week.

"Q. And at the time you received it was the letter in the envelope?

"A. Yes, sir.

"Q. Now, do you recognize the writer of the letter as any one you knew in Colorado?

"A. I remember the man at the top of the Peak that day. My wife and I visited him just before he left the top of the mountain.

"Q. Did you remember his name before you received the letter?

"A. I don't believe I would remember his name, unless he called my attention to it in the letter.

"Q. And he called attention to it in the letter?

"A. Yes, sir.

"Q. And upon receiving the letter did you hand it to me as soon as you had an opportunity to do so?

"A. I did.

(fol. 1873)

"Q. Now, do you recall any of the other people that you saw either at the Peak, or at the scene of the accident that occurred after you left there, who have not been here in court?

"A. Do I recall any of them?

"Q. Yes.

"A. Well, right off hand I don't think I do.

"Q. During the time that your wife was in the hospital, was she conscious?

"Mr. Barnes: Just a minute. I object to it on the ground that this is a showing with respect to the matter about which we have just been talking.

"Mr. Clark: Well, surely. The purpose is to show that prior to her death Mrs. James was conscious, and that he had tried to get other names so that we might proceed to take their depositions, and prove by them that she never claimed that this defendant assaulted her. That is the purpose of the question . . .

"By Mr. Clark:

"Q. Was Mrs. James conscious while she was at the hospital?

"A. She was conscious the next morning at 7:00 o'clock.

"Q. And she remained conscious until the time of her death?

"A. She did.

"Q. Do you know the names of the nurses who attended her?

(fol. 1875)

"A. No, I don't remember their names now.

"Q. Do you know of any visitors that she had after the accident, either at the hospital or at the house?

"A. Well, her father visited her.

"Q. Where is he now, do you know?

"A. He is in Fargo, North Dakota.

"Q. Any one else.

"A. Mrs. Yarnell and her two daughters visited there.

"Q. That is the daughters that have testified here?

"A. Her daughter. Her mother is in Colorado Springs.

"Q. Do you remember any others?

"A. Well, the Doctor that attended her was there every day.

"Q. Who was the doctor?

"A. Well, I heard his name the other day, but I don't remember his name now. If you told the name I would know.

"Q. May I offer the letter and envelope?

"The Court: Mark it Exhibit A on the motion.

"Mr. Clark: I have nothing further to present, your Honor.

"Mr. Williams: I have no question.

"A. Is that all?

(fol. 1876)

"The Court: Just one question, Mr. James: You referred to the daughters of Mrs. Yarnell. Was it one of the daughters that testified here?

"A. That was one of the daughters.

"Q. She was one of the daughters that visited your wife?

"A. Yes, sir.

"Mr. Barnes: We resist the motion, if the Court please, on the ground that there is no proper showing made, and all the evidence except that referred to in the letter, is merely cumulative, the witness Yarnell having testified in effect that the wife was conscious and nobody has suggested anything to the contrary, and as a matter of fact, there is no showing what the other witnesses may testify to.

"The Court: May I see the letter?

"Mr. Williams: Now, as far as the matters contained in the letter is concerned, it is a matter which may or may not have any significance. Even as indicated in the letter, it is indicated that the victim, Winona James, could have been drunk at the time of the accident. In addition to that, this matter was called to the attention of the defendant and apparently it was brought to the attention of the Court in the middle of last week—

(fol. 1878)

"Mr. Clark: If your Honor please, this defendant has not been shown in this case to be a—there is no reason for counsel for the prosecution taking that stand. He has brought into this court evidence of another offense which it is claimed took place more than four years ago, more than a thousand miles from the court room. Isn't the right of the defendant to have a trial by a jury of those in the county, which means in the community. That constitutional right exists by reason of the very great law that if justice be done, the defendant is entitled to bring his witnesses into the courtroom. It is true that counsel advised us of their intention to offer this evidence. It is also true that we were firmly convinced that the evidence could not be gotten under any conceivable set of facts, and being so convinced, we had *no* reason to anticipate that your Honor's views would differ from ours—

"The Court: I don't think you are really right on that, Mr. Clark. If you wanted to do it you should have said, 'We have the testimony and we want a continuance to get it.'

(fol. 1879)

"Mr. Clark: Well, outside of the burden of a strenuous trial, where counsel have the responsibility of a man's life upon their shoulders, they can do just one thing at one time. They have to concentrate on all the facts that are being produced. Among the three counsel who are representing the defendant here we could not be expected to go to Colorado Springs. If we had the time and the money perhaps we could do that. Those things we have not, and we had no need for

the deposition until we reached this stage of the case. I will take the broad position that where, as here, an attempt is made to prove the issues of another crime largely separated from the place of trial, and largely separated from the time of trial, that when that attempt is made then the defendant has a right to a reasonable continuance in order to get that evidence which he cannot reasonably get now, and which he should have. He doesn't know from the Indictment that he was going to have that evidence to get." (R. 684, 685, 686, 687, 688, 689.)

Thereafter the Court denied the defense motion for a continuance (R. 690).

IV.

Hope's Affidavits that His Testimony was Perjured and Known to the Prosecuting Officers to be Perjured Vitiates and Nullifies the Entire Judgment Under the 14th Amendment to the Constitution of the United States.

Since the trial Charles H. Hope has repudiated his testimony and his alleged confession, stating that it was false and induced by third degree methods, and that it was known to be false to the prosecuting officers. His affidavits filed in the court in this case have failed to secure official action setting aside the judgment which the affidavits show was based on perjured testimony (R. 920, *et seq.*).

Summary of Points Relied Upon.

I.

PROCEDURAL DUE PROCESS OF LAW WAS VIOLATED BY THE USE IN EVIDENCE OF A PURPORTED CONFESSION OBTAINED FROM THE DEFENDANT MAJOR RAYMOND LIENBA, THROUGH THIRD DEGREE BRUTAL METHODS. THE APPELLANT WAS SUBJECTED TO PHYSICAL VIOLENCE AND PROLONGED AND INCESSANT QUESTIONING WITHOUT SLEEP AND UNDER TORTUOUS MENTAL ORDEAL SIMILAR TO THAT EMPLOYED IN THE DARK AGES AND IN THE TORTURE CHAM-

BEE, FOLLOWING WHICH, STATEMENTS WERE EXTORTED AND COERCED FROM HIM AND PERMITTED IN EVIDENCE IN THE TRIAL. THE USE IN EVIDENCE OF SUCH ALLEGED CONFESSION OBTAINED BY SUCH MEANS AND METHODS MAKE VOID THE ENTIRE TRIAL UNDER THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND DENIES TO THIS APPELLANT THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II.

DURING THE TRIAL THE PROSECUTION BROUGHT TWO LIVE, HISSING, WRITHING RATTLESNAKES INTO THE COURTROOM AND PLACED THEM BEFORE THE JURY. THE RATTLE SNAKES HAD NO EVIDENTIARY VALUE. USE OF DEMONSTRATIVE EVIDENCE IN A CRIMINAL TRIAL WHICH ONLY SERVES TO INFLAME THE PASSIONS AND PREJUDICES OF THE JURY VIOLATES DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

III.

NUMEROUS WITNESSES WERE BROUGHT FROM ANOTHER STATE WITHOUT NOTICE TO THE DEFENDANT, AND HE WAS IN EFFECT PLACED UPON TRIAL IN CALIFORNIA UPON A PURPORTED OFFENSE ALLEGED TO HAVE OCCURRED IN COLORADO, WITHOUT ANY INDICTMENT, INFORMATION OR JUDGMENT THEREON AND WITHOUT ANY JURISDICTION OF THE CALIFORNIA COURT OF THE SUBJECT-MATTER THEREIN, AND WITHOUT ANY OPPORTUNITY TO THE DEFENDANT TO HAVE THE PROCESSES OF THE COURT TO PRODUCE WITNESSES IN HIS BEHALF OR TO PREPARE A DEFENSE AGAINST SUCH ACCUSATION, SUCH OFFENSE BEING IN NO WAY CONNECTED WITH THE ONE FOR WHICH HE WAS ON TRIAL. SUCH EVIDENCE CONSTITUTED A LARGE PORTION OF THE PRESENT CASE AGAINST APPELLANT AND ITS USE IN THIS CASE WAS A VIOLATION OF DUE PROCESS

OF LAW AND THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

IV.

THE PRINCIPAL TESTIMONY AGAINST THE DEFENDANT WAS THAT OF AN ALLEGED ACCOMPLICE NAMED CHARLES H. HOPE, WHO RECEIVED LENIENCY FOR HIS TESTIMONY. TO BE SUFFICIENT UNDER THE LAWS OF CALIFORNIA IT HAD TO BE CORROBORATED AS REQUIRED BY SECTION 1111 OF THE PENAL CODE OF CALIFORNIA, AND THERE WAS NO CORROBORATION. SINCE THE TRIAL THE SAID CHARLES H. HOPE HAS MADE AFFIDAVITS AND FILED THE SAME IN THE SUPERIOR COURT OF LOS ANGELES COUNTY, STATING THAT HIS TESTIMONY WAS OBTAINED BY DECEIT, FRAUD, COLLUSION AND COERCION AND WAS ENTIRELY FALSE; THAT HE WAS IMPELLED BY FORCE AND FEAR, THREATS AND PROMISES, AND THAT ALL THESE FACTS, INCLUDING THE FALSITY OF HIS STATEMENTS, WERE KNOWN TO THE PROSECUTION AND PARTICIPATED IN BY THEM. THE USE OF SUCH TESTIMONY, THUS OBTAINED, AND THE CONVICTION BASED THEREON, MAKE THE ENTIRE TRIAL A MERE PRETENSE, AND IS IN VIOLATION OF DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

V.

THE DEFENDANT WAS HELD INCOMMUNICADO, WITHOUT HIS ATTORNEY HAVING BEEN SENT FOR, IN CUSTODY IN A PRIVATE HOME, ALTHOUGH PRIOR TO THE ALLEGED CONFESSION HE REQUESTED THAT HIS ATTORNEY BE SENT FOR. THIS REQUEST WAS DENIED TO HIM AND HE WAS THEREAFTER QUESTIONED INCES-
SANTLY, WITHOUT FOOD AND REST, WITHOUT THE KNOWLEDGE OF HIS ATTORNEY AND WITHOUT HIS ATTORNEY BEING ADVISED OF THE SAME. THE DEPRIVATION OF THE RIGHT OF COUNSEL AT THIS STAGE OF THE PROCEEDINGS AND THE USE OF STATEMENTS THUS OBTAINED CONSTITUTE A VIOLATION OF DUE PROCESS OF LAW AND

THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

VI.

THE DEFENDANT WAS DENIED THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT.

I.

Procedural due process of law was violated by the use in evidence of a purported confession obtained from the defendant Major Raymond Lisenba, through third-degree brutal methods. The appellant was subjected to physical violence and prolonged and incessant questioning without sleep and under tortuous mental ordeal similar to that employed in the Dark Ages and in the torture chamber, following which, statements were extorted and coerced from him and permitted in evidence in the trial. The use in evidence of such alleged confession obtained by such means and methods makes void the entire trial under the due process clause of the 14th Amendment to the Constitution of the United States, and denies to this appellant the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States.

Use by the State of California of an improperly obtained confession from this appellant to procure his conviction of a crime constituted a denial of due process of law as guaranteed by the 14th Amendment to the Constitution of the United States.

Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 716;

White v. Texas, 310 U. S. 530, 84 L. Ed. 1342;

Canty v. Alabama, 309 U. S. 629, 84 L. Ed. 988;

Brown v. Mississippi, 297 U. S. 278, 59 L. Ed. 682.

An alleged confession obtained through enforced loss of sleep is as clearly in violation of due process of law as one obtained by force and violence.

Ziang Sung Wan v. U. S., 266 U. S. 1, 69 L. Ed. 131.

The obtaining and use of the alleged confession of James was in violation of due process of law guaranteed by the 14th Amendment to the Constitution of the United States in the following respects:

1. James was taken into custody and removed from his house without any warrant or other legal process and without any reasonable or probable cause at that time (R. 961).

2. He was not taken to any jail or legal place of confinement but was taken to a private residence by investigators and police and kept in their private custody for from 48 to 60 hours. Such taking constitutes kidnaping under Section 207 of the Penal Code of California (R. 961-2, 1057).

3. While James was kept in private custody Officer J. C. Southard committed battery upon him (R. 1059).

4. He was not allowed to have any sleep, but officers, acting in relays, questioned him constantly (R. 1057) (R. 491).

5. He was taken to the county jail and placed in a private tank known as the "High Power Tank," without any charge being preferred against him, where he was kept under constant surveillance and never allowed to be alone, even in jail (R. 1059).

6. He was continuously questioned while he was in jail and was repeatedly removed from jail at all hours of the day and night for questioning (R. 1063).

7. He was not taken before the nearest and most accessible magistrate and arraigned on any charge, as required by the constitution and statutes of California (R. 1057).

8. He was at all times denied the right to the consultation with an attorney for days, until he was lodged in the county jail, at which time he was permitted to see an attorney on one occasion (R. 1057).

9. When he was removed from the jail on the weekend, to-wit, Saturday afternoon, he asked to have his attorney sent for and was informed by the investigating officers that they could not reach his attorney. They thereupon proceeded to question him all day and all night without giving him any food or rest (R. 1078).

10. The alleged confession was taken at 1:30 to 3:00 o'clock in the morning, in the presence of the officers who had beaten him up and who had kept him without food or sleep, and who had continuously and incessantly interrogated him (R. 1078).

11. Before James was taken to the jail he had no hernia (R. 461); after he was confined in the jail he had a hernia which followed his beating (R. 1061).

12. James' ears definitely carried evidence of the beatings which he had received (R. 484, *et seq.*). His left ear was made almost permanently deaf by the beatings (R. 494).

13. He was threatened on numerous occasions that he would be beaten up and tortured if he did not confess (R. 492).

14. The officers questioned him in relays, and almost incessantly, for a period of thirteen days, immediately preceding the taking of the alleged confession (R. 484, *et seq.*).

15. He was taken out of the jail to the district attorney's office for the purpose of interrogation, against his will, and without the knowledge of his counsel or of any of his friends (R. 489).

16. The officers, although they gave James no food, ate in front of him (R. 506).

17. The officers admittedly slept while they had other relays keeping James awake with constant questioning.

18. Shortly before the alleged confession was taken from James, the officers who had him in their private charge accused him of lying and threatened to take him back to the house and "beat your God-damned head off" unless he gave them the statement they wanted, which they repeated to him "a thousand times" (R. 492, 496, R. 1064).

19. Shortly before the statement was given, after the officers had kept him in their custody all day without taking him out to eat, they took him out and bought him a steak dinner and gave him a cigar on the promise that he would "tell them the *story*" (R. 1063).

20. The officers kept terrifying James with accusations of prosecution and punishment for other offenses than the one they were investigating (R. 1060, *et seq.*).

Comparing the case of Major Raymond Lisenba with that of *Chambers v. Florida*, 309 U. S. 229, 84 L. Ed. 716, we find the following facts:

1. Major Raymond Lisenba is a poor, weak, friendless and powerless defendant (R. 980).

2. Major Raymond Lisenba was arrested on April 19, 1936; he was not taken, without delay, before a magistrate, nor was he immediately incarcerated in the county jail, as required by Sections 849 and 1597 of the Penal Code of California (R. 1056).

1. Chambers was poor, ignorant, numerically weak, friendless and powerless (84 L. Ed. 722; see also footnote 11).

2. No charges were brought against Chambers for several days, while he was being questioned (84 L. Ed. 721).

3. After preliminary questioning Lisenba was taken by officers to a private home adjoining the house where he had been living, and was there admittedly held incommunicado for a period of about 48 hours during which time he was admittedly subjected to incessant questioning by officers who worked in relays (R. 1056).

4. The questioning of Lisenba took place in relays during all of which he was deprived of rest and sleep, while the officers, after each relay questioned him for four hours, took turns at sleeping (R. 1057).

5. Lisenba was alone with his accusers, who numbered from four to twelve men, including the district attorney, the chief deputy district attorney and a host of other inquisitors (R. 1058).

6. Lisenba was admittedly hit by one of the officers having him in custody (R. 1058). He was ruptured, his ear was made red and swollen and he was made hard of hearing as a result of the beating he received (R. 1061). He testified he was

3. Chambers, from the afternoon of Saturday, May 20th, until sunrise of the 21st, underwent persistent and repeated questioning and cross-questioning (84 L. Ed. 718).

4. Chambers was questioned for several days, and all night, before the confessions were secured.

5. Chambers was carried singly from his cell and subjected to questioning in a fourth-floor jail room by four to ten men, including the county sheriff, his deputies, a convict guard and other white officers and citizens of the community.

6. The testimony is in conflict as to the fact that all four prisoners were constantly threatened and physically mistreated until they finally, in hopeless desperation and fearing for their lives, agreed to confess on Sunday morning, just after

afraid for his life and finally agreed to tell what the officers wanted him to tell in order to avoid further beatings and mistreatment (R. 1063, R. 492, 493).

7. Lisenba was subjected to continuous questioning from the time of his arrest on April 19, until May 2, when the alleged confession was secured from him (R. 1063).

8. Lisenba was taken from the jail to the district attorney's office Saturday afternoon on May 2 (R. 1063). His request for his attorney was denied (R. 1058).

9. From the time Lisenba was taken to the district attorney's office, he was not given any food or rest, but was continuously questioned all day and night. He was left alone in the custody of the officers who slapped him (R. 497, 1059).

10. Sandwiches and coffee were served to the men who grilled Lisenba (R. 506).

11. Some time around midnight Lisenba finally said to his interrogators that if they would take him out and buy him a meal he would "tell the story." The confession of Lisenba broke at

daylight.

7. Chambers was subjected to continuous questioning from May 14 to May 20 and 21, when the confession broke.

8. Chambers was taken from his cell on Saturday afternoon and continuously questioned, with a concentration of effort directed against him.

9. In the Chambers case, from 3:30 Saturday afternoon, with only short intervals for food and rest for the questioners, they stayed up all night.

10. Sandwiches and coffee were served to the men who grilled Chambers.

11. Sometime in the early hours of Sunday on May 21, probably about 2:30 or 3:00 o'clock A. M., the confession broke.

about 1:45 A. M. and was taken down by the district attorney between that time and about 3:00 or 3:30 A. M. (R. 1063).

12. Lisenba was not indicted until after the alleged confession. He was indicted on May 6th, the first formal accusation in the case and upon his arraignment he promptly pleaded not guilty (R. 1075, R. 816).

Comparing the case of Major Raymond Lisenba with that of *White v. Texas*, 310 U. S. 530, 84 L. Ed. 1342, we find the following:

1. Defendant Lisenba is illiterate, uneducated and poor — under sentence of death (R. 980).

2. Defendant Lisenba was taken into custody without warrant and held without legal accusation against him for seventeen days (R. 961, 963).

3. Defendant Lisenba was not taken to a jail but to a private house and detained there for at least 48 hours without rest or sleep; he was then taken to the jail, from which he was removed at all hours of the day and night for constant and persistent questioning. Each time he was asked to confess (R. 1056) (R. 1057).

12. Chambers was not indicted until after the confession.

1. Defendant White was an illiterate farm hand—under sentence of death.

2. Defendant White was taken into custody without warrant and held without legal accusation for six or seven days.

3. Defendant was taken to the county jail and was removed from the jail by Texas rangers on several successive nights. Each time he was asked to confess.

4. Officer Southard in charge of the investigation admitted striking the defendant. The officers admitted that during the early part of the investigation he was permitted no sleep and that he was held incommunicado. The defendant says he was beaten about the face and head and made hard of hearing. He also says that as a result of the mistreatment he suffered a hernia. Other witnesses corroborated the fact that his ear was swollen and red and that he had a hernia which he did not have five months before his arrest.

5. During the period of his arrest, up to and including the giving of the alleged confession Lisenba was held incommunicado and was out of touch with friends or relatives, and no one except the officers on the investigation knew where he was. He asked to have his lawyer sent for. He was told one lawyer was unavailable and the other one would not know anything about the case (R. 1059-1061).

6. The defendant was removed from jail day and night, after he was lodged there. The questioning was

4. The petitioner said he was whipped. The officers denied this but admitted taking him to the woods.

5. During the period of his arrest, up to and including the signing of the alleged confession the petitioner White had no lawyer, no charges were filed against him, and he was out of touch with friends or relatives.

6. The local peace officer was not sure how many times the prisoner was removed from jail.

constant and persistent. While in jail he was confined in the "High Power Tank" (R. 1078).

7. Defendant says that before the confession he was left alone in a room with the officer who had first struck him, and was told that unless he confessed the officer would "beat his God-damned head off" (R. 497).

8. In jail the defendant Lisenba was under constant surveillance of the sheriff and was kept in a special place called the "High Power Tank," and was continually questioned by officers in relays; he was also frequently removed from the jail at all hours of the day and night for questioning (R. 1062) (R. 1060).

9. The defendant's alleged confession was taken down between 1:45 and 3:00 or 3:30 o'clock A. M. (R. 1078).

10. Immediately before it was taken down Lisenba was repeatedly asked by the district attorney to confess, and the district attorney conducted the interrogation in the presence of numerous deputies in the district attorney's office and the sheriff's office (R. 499) (R. 501).

7. Rangers kept taking the petitioner to the woods, and threatened him. Before carrying petitioner to Beaumont, where the alleged confession was taken, the sheriff talked about an hour and a half with him.

8. In jail, the sheriff put petitioner by himself and "kept watching him and talking to him."

9. The alleged confession was reduced to writing after 2:00 A. M.

10. Immediately before it was taken down the petitioner was asked by the private prosecutor whether he was ready to confess.

Comparing the case of Major Raymond Lisenba with that of *Brown v. Mississippi*, 297 U. S. 278, 287, 80 L. Ed. 682, we see as follows:

1. In the case of Major Raymond Lisenba, aside from the alleged confessions there was no evidence sufficient to warrant the submission of the case to the jury (R. 984).

2. After preliminary inquiry showing brutal third degree methods, physical violence and deprivation of sleep, and a course of continuous questioning for thirteen days, the confessions were received over the objection of defense counsel (R. 629).

3. Lisenba testified that the confessions were false and had been procured by physical and mental torture (R. 484 *et seq.*).

4. The case went to the jury with instructions that if the jury had reasonable doubt as to the confessions having resulted from coercion, and being untrue, they were not to be considered as evidence, but the court refused an instruction setting up all the things that were done to Lisenba, embodied in a single instruction (R. 1122).

1. In the case of *Brown v. Mississippi*, aside from the alleged confessions there was no evidence sufficient to warrant the submission of the case to the jury.

2. After a preliminary inquiry testimony as to the confessions was received over the objections of defense counsel.

3. Defendants testified that the confessions were false and had been procured by physical torture.

4. The case went to the jury with instructions, upon request of defense counsel, that if the jury had reasonable doubt as to the confessions having resulted from coercion, and being untrue, that they were not to be considered in evidence.

5. On appeal to the Supreme Court the defendant assigned as error the inadmissibility of the confessions (R. 950 *et seq.*).

6. Defendant Lisenba sought a new trial in the Supreme Court of California, one of the grounds being that the alleged confessions were obtained by coercion and brutality, known to the court and to the district attorney (R. 950 *et seq.*).

7. Lisenba complained that he had been denied the benefit of counsel or an opportunity to confer in a reasonable manner. It was not denied by the officers having custody of him that he was held incommunicado for a considerable period, or that they had not secured his counsel when he asked for such counsel (R. 484 *et seq.*). Lisenba's testimony was supported by the testimony of the people's own witnesses (R. 950 *et seq.*).

8. Upon being taken into custody Lisenba was taken to a private home where he was accused by a number of men of the crime (R. 1056).

5. On their appeal to the Supreme Court the defendants assigned as error the inadmissibility of the confessions. The judgment was affirmed.

6. Defendants then moved in the Supreme Court of the State, to arrest the judgment and for a new trial, on the ground that all the evidence against them was obtained by coercion and brutality, known to the court and to the district attorney.

7. Defendants complained that they had been denied the benefit of counsel or opportunity to confer with counsel in a reasonable manner. The motion was supported by affidavits.

8. Brown, on the night of his arrest, was taken to the home of one of the other defendants where a number of white men were gathered who began to accuse him of the crime.

9. Upon Lisenba's denial, one of the officers admittedly committed a battery upon him (R. 1058).

10. Lisenba was constantly and continuously questioned and kept weak from lack of sleep (R. 1059).

11. Lisenba, after days and nights of continuous questioning, cross-questioning and threats, denied his guilt (R. 1059).

12. Lisenba was placed in a room with the deputy who had struck him and told by the deputy that unless he confessed the deputy would "beat his God-damned head off" (R. 497). He was made hard of hearing and ruptured as a result of this mistreatment (R. 494).

13. Lisenba was told to tell "the story" the way the officers wanted it. They had repeated it to him "a thousand times."

9. Upon his denial they seized the defendant and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down, they hanged him again and let him down a second time, and still he protested his innocence.

10. Brown, tied to a tree and whipped, still declined to accede to the other demands that he confess, and was finally released and returned to his home with some difficulty.

11. Brown was again arrested and taken to jail in a contiguous county. On his way he was stopped and severely whipped.

13. Brown was made to understand that the whipping would be continued unless and until he confessed in every detail as demanded by those present.

14. The officer in charge of the investigation admitted he had struck Lisenba (R. 1060).

15. The officers investigating the case admitted that "one of Lisenba's ears may have been red" (R. 1061).

16. The district attorney, nevertheless, went through the solemn farce of hearing the "free and voluntary confession" of Lisenba at 1:45 in the morning, and he and others then present were witnesses used in court to establish the so-called confession and its "voluntary" character which was received in court and admitted into evidence over the objections of the defendant (R. 629, 630, 1063).

17. There was thus ample before the court when these confessions were first offered to make known to the court that they were not beyond all reasonable doubt free and voluntary (R. 484 *et seq.*).

18. The State does not deny that Lisenba was struck. They do not deny that he was held incommunicado,

14. The sheriff of the county of the crime admitted that he had heard of the whipping, but averred he had no personal knowledge of it.

15. The sheriff admitted that one of the defendants, when brought before him, was limping and did not sit down.

16. Nevertheless, the solemn farce of hearing the "free and voluntary confessions" was gone through with, and these two sheriffs and one other person then present were the three witnesses used in court to establish the so-called confessions which were received by the court and admitted in evidence over the objections of the defendants.

17. There was thus enough before the court when these confessions were first offered to make known to the court that they were not beyond all reasonable doubt free and voluntary.

18. The State does not deny mistreatment of Brown.

nor that he was persistently questioned, day and night, and at all hours, prior to the securing of the alleged confession, for 13 days (R. 950 *et seq.*).

19. The facts are not only undisputed, they are admitted, and admitted to have been done by officers of the State, and all this was definitely well-known to everybody connected with the trial, including the State's prosecuting attorney and the trial judge presiding (R. 484 *et seq.*, R. 629, 630).

19. The facts are not only undisputed, they are admitted, and admitted to have been done by officers of the State in conjunction with other participants, and all this was definitely well-known to everybody connected with the trial, and during the trial, including the State's prosecuting attorney and the trial judge presiding.

The court said in the *Brown v. Mississippi* trial, 80 L. Ed. p. 687:

"Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to a conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. *Moore v. Dempsey*, 261 U. S. 86, 91, 67 L. Ed. 543, 545, 43 S. Ct. 265. The State may not deny to the accused the aid of counsel. *Powell v. Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55, 84 A. L. R. 527. Nor may a State through the action of its officers, contrive a conviction through the pretense of a trial which in truth is 'but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.' *Mooney v. Holohan*, 294 U. S. 104, 112, 79 L. Ed. 791,

794, 55 S. Ct. 340, 98 A. L. R. 406. And the trial equally is a mere pretense where the State authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires 'that State action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' *Herbert v. Louisiana*, 272 U. S. 312, 316, 71 L. Ed. 270, 272, 47 S. Ct. 103, 48 A. L. R. 1102. It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for a conviction and sentence was a clear denial of due process.

"2. It is in this view that the further contention of the State must be considered. That contention rests upon the failure of counsel for the accused, who had objected to the admissibility of the confessions, to move for their exclusion after they had been introduced and the fact of coercion had been proved. It is a contention which proceeds upon a misconception of the nature of petitioners' complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. *Moore v. Dempsey*, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265, *supra*. We are not concerned with a mere question of State practice, or whether counsel assigned to petitioners were competent or mistakenly assumed that their first objections were sufficient. In an earlier case the Supreme Court of the State had recognized the duty of the court to supply corrective process where due process of law had been denied. In *Fisher v. State*, 145 Miss. 116, 134, 110 So. 361, the court said: 'Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief iniquity, the crowning infamy, of the Star Chamber,

and the Inquisition and other similar institutions. The constitution recognized the evils that lay behind these practices and prohibited them in this country. * * * The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective.' "

In *Chambers v. Florida*, 309 U. S. 227, 84 L. Ed. 716, 722, 723, it is said:

"The determination to preserve an accused's rights to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless.

"This requirement—of conforming to fundamental standards of procedure in criminal trials—was made operative against the States by the Fourteenth Amendment. Where one of several accused had limped into the trial court as a result of admitted physical mistreatment, inflicted to obtain confessions upon which a jury had returned a verdict of guilty of murder, this Court recently declared, *Brown v. Mississippi* (297

U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461), that 'It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.' "

In *White v. State of Texas*, 310 U. S. 530, 84 L. Ed. 1342, 60 S. Ct. 706, the Court said, quoting from *Chambers v. Florida*, 309 U. S. 227, 84 L. Ed. 716:

' "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death." "

II.

During the trial the prosecution brought two live, hissing, writhing rattlesnakes into the courtroom and placed them before the jury. The rattlesnakes had no evidentiary value. Use of demonstrative evidence in a criminal trial which only serves to inflame the passions and prejudices of the jury violates due process of law and the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States.

The bringing of live, hissing, writhing rattlesnakes into the courtroom was an appeal to the passions and prejudices of the jury. Demonstrative evidence that merely inflames the passions of jurors was in violation of due process of law guaranteed by the 14th Amendment to the Constitution of the United States. A fair trial is the essence of due process of law. The trial must not be hurried to a conviction by passion and prejudice and must not be ruled by things that blind the reason and sway the jury from a fair consideration of the case.

Chambers v. Florida, 309 U. S. 227, 242, 84 L. Ed. 716;

Snyder v. Mass., 291 U. S. 97, 78 L. Ed. 674;

Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543;

Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97;

Hurtado v. U. S., 110 U. S. 516, 28 L. Ed. 232.

The deceased died of drowning. (R. 93.) The bringing of the rattlesnakes into the courtroom had no evidentiary value to prove the death of the deceased through drowning, nor did it have any evidentiary value in proving or disproving to the jury any alleged attempt on the part of the defendant or anyone else to kill the deceased by means of a rattlesnake. It was testified to that only one rattlesnake was used, and yet three snakes were brought before the jury and allowed to be exhibited in a manner that caused horror and panic in the courtroom. As stated on the motion for new trial:

"On said day the District Attorney, acting through his said deputies, for the purpose of inflaming the minds of the jurors, caused to be brought into the courtroom the said two rattlesnakes. The said snakes were in a box which was carried down the aisle of the courtroom, every seat of which was occupied. The snakes were alive and sounding their rattles. A wave of terror—I can find no other language more accurate—swept through the courtroom. Spectators rose from their seats. Some nearest the aisle shrank away. Many uttered exclamations of fright.

"The scene as described by a reporter of the Herald-Express (a large daily newspaper) was as follows:

"'Buzzing their hollow rattles so loudly that women in the crowded courtroom shivered and shuddered at the eerie, frightening sounds, two diamond-back rattlesnakes glittering in their new skins today were placed on the counsel table in Superior Charles W. Fricke's court, where Robert S. James, Birmingham barber, crouched ghost-faced and jittery at his trial for the murder of his golden-haired bride, Mary.

"'Paraded across the courtroom in a velvet covered, venom-splashed 5-foot glass cage, two deadly diamond-back rattlesnakes late today hissed and shook their hol-

low rattles eerily, and struck out with their evil wedge-shaped heads, as they were exhibited less than 2 feet away, before the fascinated eyes of 10 men and 2 women who made up the jury trying Robert S. James for the murder of his golden-haired wife, Mary.

“‘The reptiles had just been identified by Snake Joe Houtenbrink as Lethal and Lightning, two guaranteed ‘hot’ snakes he had sold to Charles H. Hope, hard talking ex-sailor, the day before Mrs. James was slain by drowning in her bathtub in her La Canada home.’

“The Examiner reporter gave the following description of the scene:

“‘Man’s enemy from primordial ages, the snake, yesterday was made the living, visible symbol of the Robert James murder case. The diamond-backed rattlesnakes hissed and struck before the trial jury as a long glass box was borne forward like a hideous offering of a black ritual.’

“‘I was standing with my face toward the jury at the time. I noticed some of them gave a kind of gasp almost at the moment I noticed the consternation of the audience. Some of the spectators, however, rose to their feet. Many of them shrank away. I made a protest at the time because of the obvious effect which the bringing of the snakes into the courtroom had upon the spectators.

“‘I am informed and believe, and therefore state the fact to be, that the bringing of the rattlesnakes into the courtroom in the manner described had such effect upon the minds of the jurors as prevented them from giving fair consideration to the evidence thereafter introduced by the defendant. The source of my said information is a newspaper article containing alleged interviews with members of the jury, none of whom have publicly, or so far as I know at all, denied the statements attributed to them.

“‘The said interviews were published in a daily newspaper of large circulation, to-wit: the Los Angeles Examiner, of July 25, 1936, and I quote from them as follows:

“Harold W. Hart, one of the jurors, said:

“ ‘James had been convicted in my own mind ever since they brought the rattlesnakes into the courtroom, showed them to us, and then introduced witnesses who told us that James had actually stuck his wife’s foot into a box containing one of these serpents and had watched it strike her.’ ”

“Mrs. Ollie Sype said:

“ ‘The sight of the rattlesnakes which were exhibited as weapons with which Robert James did his wife to death stunned me. It was the most shocking experience of my life.’ ”

The exhibition of these snakes did not prove, or even tend to prove any issue in this case, since neither the appearance nor the conduct of these snakes as they were shown to the jury tended to establish any facts under controversy. Their only purpose, therefore, was to excite the passion and prejudice of the jurors. Where the exhibition of objects is solely for the purpose of arousing prejudicial emotions and through cunning presentation stir up passion or unduly incite hatred and animosity, and so lead the jury to act upon passion and prejudice instead of proof, due process of law is violated, because the accused is deprived of a fair trial. (*Chambers v. Florida*, 309 U. S. 229, 84 L. Ed. 716; *Snyder v. Massachusetts*, 291 U. S. 97, 78 L. Ed. 674.)

In *McKay v. State*, 39 L. R. A. (N. S.) 714, it is stated that “an accused in a criminal prosecution is entitled to a trial upon competent, relevant evidence; evidence which at least tends to establish his guilt or innocence, and evidence which has no such tendency but which, if effective at all, could only serve to inflame the minds and passions of the jury, should not be admitted.”

The Court there said, with reference to the admission into evidence of two shirts stained with blood, and various articles of clothing, that their admission in evidence was error, since the testimony of the coroner, a practicing physician and surgeon, showed that the deceased had received three blows on the side of his head, each of which fractured his skull, and two of which penetrated the brain, either of which the doctor said was sufficient to have proved fatal. The Court there pointed out that the evidence was clear that the deceased had been murdered and the only question before the jury was, did the defendant commit the murder? The admission of bloodstained garments, flaunting them before the jury, could in no manner identify, or even tend to identify, the prisoner, as to the murder. The Court there said:

"We can conceive of no other purpose which these exhibits could subserve than to excite the passions and inflame the minds of the jury. A defendant who is being tried for any offense, and particularly one involving the possible taking of his life, is entitled to a trial upon competent evidence,—evidence which tends to show his guilt or innocence, and not upon evidence which has no tendency in that direction but which can only serve the purpose of distracting the minds of the jury from the real issue to gruesome exhibits, which may easily lead them to a wrong conclusion."

On rehearing, the Court again affirmed its former ruling, stating:

"No attempt to disguise the motive of counsel in offering these blood-stained garments in evidence can obscure the fact that the real motive was for the purpose of exciting the passions of the jury."

In *Flege v. State*, 93 Neb. 619, 142 N. W. 276, 47 L. R. A. (N. S.) 1107, the Court, in reversing the case for improperly admitting into evidence clothing worn by the deceased at

the time of her death, which did not prove defendant's guilt but were only introduced for the purpose of inflaming the jury, stated (p. 1112):

“There is nothing in the record showing that the exhibition of the bloody and burnt garments was a proper or necessary part of the state's case. The court adheres to the holding in *McKay v. State*, 90 Neb. 63, 39 L. R. A. (N. S.) 714, 132 N. W. 741, Ann. Cas. 1913B, 1034, Id. 91 Neb. 281, 39 L. R. A. (N. S.) 720, 135 N. W. 1024, Ann. Cas. 1913B, 1039, that it appears that the introduction of the bloodstained garments was for the purpose of arousing the passions of the jury, and by that means securing a conviction, the practice should be condemned and a judgment of conviction reversed. Unless it appears that the offered evidence would be material to some inquiry in the case on trial, such exhibits should be excluded. See *Cole v. State*, 45 Tex. Crim. Rep. 225, 75 S. W. 527; *Christian v. State*, 46 Tex. Crim. Rep. 451, 83 S. W. 822; *Williams v. State*, 61 Tex. Crim. Rep. 356, 362, 136 S. W. 771; *Lucas v. State*, 50 Tex. Crim. Rep. 219, 95 S. W. 1055. In 2 Wharton, on Criminal Evidence 10th ed. sec. 941, it is said: ‘As clothing is in the nature of demonstrative evidence it has a strong tendency to arouse feelings of prejudice or passion, and unless the articles so introduced serve the purpose of identifying *the purpose of identifying* the deceased, or of honestly explaining the transaction, the introduction is irrelevant, and constitutes prejudicial error; and particularly is this true when it is displayed in such manner as to arouse prejudice and passion.’”

As pointed out by the dissenting opinion of the late Mr. Justice Seawell of the California Supreme Court,—“what aid the two live rattlesnakes which were brought into the courtroom, rattling and writhing, and thus exhibited to the jury in determining the cause of death on any theory, does not appear from a painstaking examination of the entire transcript of the proceedings, and we feel satisfied

that the spectacular exhibition of the rattlesnakes, in the circumstances to be hereafter noted, unquestionably constituted prejudicial error."

The production of the snakes in the courtroom constituted a violation of due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

In *Frank v. Mangum*, 237 U. S. 309, at 334, this Court, in commenting on a trial alleged to have been dominated by a mob, said:

"We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law."

Again, in *Downer v. Dunaway*, 53 F. (2d) 586, the Court there granted a writ of *habeas corpus* where the trial was dominated by a mob.

A trial dominated by fear of rattlesnakes is no different in principle than a trial dominated by mob violence. Mob violence occurs by a shouting, hooting, ferocious and inflamed group outside, creating a state of fear and apprehension in the minds of the jurors and distracting their attention from the true issues in the case and from finding a verdict according to the facts, the law and the evidence. The bringing of live rattlesnakes into the courtroom, creating a state of fear inside the courtroom, likewise produced a verdict based on passion and prejudice, stunned the jurors and distracted them from the facts, the law and the evidence.

In *Moore v. Dempsey*, 261 U. S. 86, 67 L. Ed. 543, the Court said:

"But if the case is that the whole proceeding is a mask, that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights."

So, in this case, the whole proceeding was but a mask of a trial. A woman was found drowned, but the proceedings centered mostly on rattlesnakes, the hissing, writhing bodies of which were exhibited to the jury with no other thought or purpose than to sweep the jury to the irresistible end, a conviction of murder in the first degree. The whole trial was therefore a mock and a sham.

In *Ippolito v. U. S.*, 108 F. (2d) 668, 671, the court in commenting on prejudicial remarks made to a jury, and ordering a judgment reversed, said:

"Public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by appeals of counsel to passion and prejudice."

In that case, peculiarly enough, counsel made an argument to a jury in which it was stated: "I hope this jury will keep its eyes open the same as it would if it were walking in a jungle full of *rattlesnakes* and skunks."

If comment to the jury about rattlesnakes is prejudicial, as appealing to the passions and prejudices of the jurors, how much more is the actual bringing of the snakes into the courtroom?

In *People v. Madison*, 3 Cal. (2d) 668, 679, the court said:

“* * * we cannot give sanction to the practice of exhibiting unnecessarily to the jury gory physical evidences of the crime which are calculated or likely to inflame the jury’s deliberations.”

Due process comprehends a fair and just hearing and a full and adequate opportunity for defense.

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55, 84 A. L. R. 527;

Hurtado v. California, 110 U. S. 516, 28 L. Ed. 232, 4 S. Ct. 111, 292;

Maxwell v. Dow, 176 U. S. 581, 44 L. Ed. 597, 20 S. Ct. 448, 494;

Holden v. Hardy, 169 U. S. 366, 42 L. Ed. 780, 18 S. Ct. 383;

Twining v. New Jersey, 211 U. S. 78, 111, 53 L. Ed. 97, 111, 29 S. Ct. 14;

Interstate Commerce Comm. v. Louisville & N. R. Co., 227 U. S. 88, 93, 57 L. Ed. 431, 434, 33 S. Ct. 185;

United States v. Abilene & S. R. Co., 265 U. S. 274, 288, 68 L. Ed. 1016, 1022, 44 S. Ct. 565.

There was also a denial of equal protection of the law as well as the due process clause of the 14th Amendment.

Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124, 27 A. L. R. 375.

“Due process implies, at least, conformity to natural and inherent principles of justice. * * *

“There are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, and these principles recognize the inherent rights of the individual, and are embodied and intended to be protected and secured by the fundamental law, and the 14th Amend-

ment imposes upon the courts the duty to protect every individual or corporation from arbitrary denial or abridgment of those rights by the state."

Holden v. Hardy, 169 U. S. 366, 42 L. Ed. 780, 790.

It is said in 1878, Mr. Pitt Taylor, *Evidence*, 7th ed. I, par. 557:

"Though evidence addressed to the senses, if judiciously employed, is obviously entitled to the greatest weight, care must be taken not to push it beyond its legitimate extent. The minds of jurymen, especially in the remote provinces, are grievously open to prejudices, and the production of a bloody knife, a bludgeon, or a burnt piece of rag, may sometimes, by exciting the passions or enlisting the sympathies of the jury, lead them to overlook the necessity of proving in what manner these articles are connected with the criminal of the crime; and they consequently run no slight risk of arriving at conclusions which, for want of some link in the evidence, are by no means warranted by the facts proved. The abuse of this kind of evidence has been a fruitful theme for the satirists, and many amusing illustrations of its effect might be cited from our best authors. Shakespeare makes Jack Cade's nobility rest on this foundation: for Jack Cade having asserted that the eldest son of Edmund Mortimer, Earl of March, 'was by a beggar woman stolen away', 'became a bricklayer when he came to age', and was his father, one of the rioters confirms the story by saying, 'Sir, he made a chimney in my father's house, and the *bricks* are alive to this day to testify to it; therefore deny it not.' Archbishop Whateley—who makes use of the above anecdote in his '*Historic Doubts relative to Napoleon Buonaparte*,'—adds, 'Truly, this evidence is such as country people give one for a story of apparitions; if you discover any signs of incredulity, they triumphantly show the very house which the ghost haunted, the identical dark corner where it used to vanish, and perhaps even the tombstone of the person whose death it foretold.' "

"The great dramatist's example in 'Julius Caesar' will occur to everyone: 'See, what a rent the envious Casca made! * * * Here is himself, marred, as you see, with traitors.' For the extent to which the Roman advocates developed this method of tempting emotions to overwhelm reason, see Forsyth's Hortensius the Advocate, 3d ed. 92, 96." (*Wigmore on Evidence*, 3rd ed., Vol. IV, p. 253.)

1877, *Scintillae Juris*, 58, by Mr. Justice C. J. Darling, states:

"What is called 'real evidence'—mostly bullets, bad florins, and old boots—is of much value for securing attention. This is true even when these exhibits prove nothing,—as is generally the case. They look so solid and important that they give stability to the rest of the story. The mind in doubt ever turns to tangible objects. They who first carved for themselves a Jupiter from a log of wood knew very well that the idol could do nothing for them; but it enabled them easily to realize a power who could. A rusty knife is now to an English juryman just what a 'scarabaeus' was to an Egyptian of old. I have seen a crooked nail and a broken charity-box treated with all the reverence due to relics of the holiest martyrs."

This "libellus," by Mr. C. J. (later Justice) Darling, published at first anonymously, went into its eighth edition and perhaps later editions, and is as applicable to the case of Major Raymond Lisenba today as it was when written.

III.

Numerous witnesses were brought from another State without notice to the defendant, and he was in effect placed upon trial in California upon a purported offense alleged to have occurred in Colorado, without any indictment, information or judgment thereon and without any jurisdiction of the California court of the subject-matter therein, and with-

out any opportunity to the defendant to have the processes of the Court to produce witnesses in his behalf or to prepare a defense against such accusation, such offenses being in no way connected with the one for which he was on trial. Such evidence constituted a large portion of the present case against appellant and was a violation of due process of law and the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States.

The use of evidence obtained in Colorado by the State of California in California is in violation of due process in the following respects :

1. The very essence of due process of law is notice and an opportunity to be heard.

Powell v. Alabama, 287 U. S. 45, 68 ;

Galpin v. Page, 18 Wall. 350, 368, 369 ;

Frank v. Mangum, 237 U. S. 309, 340.

The necessity of due notice and an opportunity to be heard are among the immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard. Judgment without notice and opportunity to be heard wants all the attributes of a judicial determination. It is judicial usurpation and oppression and never can be upheld where justice is justly administered.

Even before the 14th Amendment was adopted, the Supreme Court had insisted that common justice required that no man should be condemned in person or property without notice and an opportunity to make his defense.

Baldwin v. Hale, 1 Wall. 223, 233.

In *Twining v. New Jersey*, 211 U. S. 78, 110, the Court observed that these two fundamental conditions seemed to be universally prescribed in all systems of law established by civilized countries.

To place a man upon trial in California upon an indictment charging him with an alleged murder in California, and then to bring witnesses to the State of California from Colorado regarding an alleged occurrence several years before in the State of Colorado, is necessarily without notice to him of that charge and without an opportunity to defend against it.

When for the first time such evidence is proposed to be presented by the prosecution when the accused and his counsel are seated in the trial of the case, how can he prepare to meet such a charge growing out of alleged occurrences in another state? What processes of the court does he have to bring witnesses from that other state to the state in which he is placed upon trial? None whatsoever. The result necessarily follows that he is deprived of an opportunity to meet such a charge and to defend against it.

It is no answer to say that he is not on trial on that charge but only on trial on the charge in the California court. Such a statement necessarily proves the very lack of notice and of opportunity to prepare and to defend against such other evidence. The very fact that the prosecutor produced it in court in this case shows that it is persuasive and calculated to sway the jury in this case to convict the defendant. Therefore all opportunity must be afforded to the defendant to meet such evidence if it is proper to be presented at all. This is not the case where a person has been tried in another state where the court has jurisdiction of both the person and the subject-matter and where the processes of that court are available to the accused and where he thereafter finds himself convicted and is faced with the impeaching questions growing out of such a conviction.

2. Article VI of the United States Constitution provides for the trial of a person in the vicinage where the offense

was committed. This is the old common law rule, and of course its object is to give to the person accused the right to be tried and to produce the witnesses where those witnesses are available. To place a defendant on trial more than a thousand miles away and to produce witnesses from another state which the state has the power to produce by reason of its unlimited finances is a violation procedurally of due process of law.

It violates also two fundamental principles of the production of legal evidence—one being unfair surprise, and the other, unfair prejudice. (See Wigmore on Evidence, 3rd Ed., Section 1157.)

The evidence in this case on the Colorado situation was offered to show a general plan or scheme. The alleged offense in Colorado occurred four years prior. It was in no way connected with the present alleged offense for which the defendant was placed on trial. Hence the occurrence in Colorado could have no evidentiary value to show a general scheme or plan to do the thing charged in this case. It could only be produced for the purpose of prejudicing the accused in the minds of the jury. It was not at all inter-related and so could not be a part of an alleged general scheme or plan.

In California a person charged with crime has no means of getting any additional information in advance of his trial other than that furnished to him by the prosecutor. There are no provisions in law for a bill of particulars. All that the defendant was entitled to have was a copy of the indictment and the transcript of such witnesses as the district attorney chose to present to the Grand Jury, at which time no counsel for the defendant could be present; nor could he request or secure any other additional information prior to trial. No counsel for the defendant could be present in the Grand Jury room. The district attorney is re-

quired to present only such evidence as he may wish to present to the Grand Jury.

In 1936, in California, a witness was not required to attend court unless he lived a distance of less than 100 miles from the place of trial. (Section 1989, Code of Civil Procedure of California.)

In *Commonwealth v. Kentucky*, 112 F. (2d) 352 (June 5, 1940) at page 355, the court said:

"The tribunals of one state have no jurisdiction over persons of other states unless found within their territorial limits and the attempt to extend their process into other states would be treated in every other forum as an act of usurpation without binding efficacy. Process from courts of one state cannot summon parties living in another state to leave its territory and respond to proceedings against them and where the only object of an action is the determination of personal rights and obligations of a defendant, constructive service on a non-resident is ineffectual. A person residing outside the state is not required to come within its borders and submit his controversy to its courts because of notice of the suit at the place of his residence, and an ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in, as outside, the state. *Galpin v. Page*, 85 U. S. 350, 367, 18 Wall. 350, 367, 21 L. Ed. 959; *Pennoyer v. Neff*, 95 U. S. 714, 727, 24 L. Ed. 565; *Baker v. Baker, Eccles & Co.*, 242 U. S. 394, 403, 37 S. Ct. 152, 61 L. Ed. 386; *MacDonald v. Maber*, 243 U. S. 90, 97, 37 S. Ct. 343, 61 L. Ed. 608, L. R. A. 1917F. 458; *Flexner v. Farson*, 248 U. S. 289, 293, 39 S. Ct. 97, 63 L. Ed. 250."

It follows therefore that both the accused and his attorney are powerless under such circumstances to prepare a defense to a host of witnesses brought from another state and to get witnesses who may controvert, contradict or

satisfactorily explain the statements made by those witnesses.

And if a man is entitled to the right of counsel to defend himself at all stages of the proceedings, as set forth in *Powell v. Alabama*, 287 U. S. 45, 77 L. Ed. 158, how can such counsel adequately defend a poor client when he has no opportunity, even if funds were available, to go to another State during the middle of a trial, to secure the necessary evidence; and how can he properly defend a man where he is entirely unfamiliar with the locale of the alleged other offense, has no opportunity to examine the highways to determine if they are straight or crooked, and whether they are in the condition which many witnesses may testify to.

In *Snyder v. Mass.*, 291 U. S. 97, 78 L. Ed. 674, it was held that the absence of the defendant from the scene of an alleged offense on a view of the premises by the jury, did not deny due process of law, one reason being that the attorney was present at the scene and two of the jurors.

But here, the attorney would have no opportunity to view the scene described by witnesses from another jurisdiction, and would have no opportunity to interview witnesses who lived in the neighborhood and who might have important information which would explain, clarify or deny the testimony of other witnesses. Such procedure, we respectfully submit, violates due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

In the dissenting opinion of the late Mr. Justice Seawell of the California Supreme Court, he points out as follows:

“The admissibility and sufficiency of the evidence admitted to prove that the death of Winona, which occurred in the State of Colorado in 1932, was accomplished by the felonious and premeditated act of the defendant, waiving the reasonable doubt doctrine, depends upon the further question as to whether it satis-

fied the rule which provides that such evidence cannot be admitted if in character it is so vague, uncertain or unsubstantial as merely to create a suspicion of guilt. Defendant further objected to an offer of proof of the other alleged crime claimed to have been committed in another jurisdiction distant more than a thousand miles from the place of trial and invoked the common law and statutory rights which vouchsafe the rights of an accused to be tried in the county in which the crime was committed. The ancient right cannot be denied in a case where punishment is to be imposed for the specific offense charged in the indictment or information. The right does not exist where the evidence of another crime is limited in its probative scope and effect to the purposes heretofore defined. The appellant complains that great distance from the situs of the offense deprives the accused in many cases of the means of discovering evidence material to his defense and, in effect, amounts to a denial of the process of the court to compel the attendance of witnesses in his behalf (Cal. Const. art. I, sec. 13). The point urged is illustrated by a matter which arose at the trial of the instant case. J. D. Rogers, the superintendent of Pike's Peak Auto Highway, a private enterprise, was brought from Colorado as witness on behalf of the state. He testified that, upon his arrival at the scene where Winona James was injured and in attempting to ascertain whether she was breathing, he placed his head near her mouth and detected a strong odor of liquor on her breath. This evidence furnished support to the prosecution's argument to the jury that James had made her drunk before the automobile crash. This evidence would not have ordinarily been anticipated by the defendant in advance of trial, a contingency which frequently arises in the trial of cases. The appellant brought to the court's attention the fact that a letter had been recently delivered to him at the county jail, written by a party or parties in Colorado, outside the jurisdiction, who met and talked with Mr. and Mrs. James at the top of Pike's Peak a short time before

they started down the mountain stating they could and would testify that there was no evidence or indication that either Mrs. James or James was affected by liquor. It appears from the discussion between court and counsel that the named party volunteering the information by letter and counsel for defense were acting in good faith in the matter, and counsel, in asking the process of the court to produce the evidence by deposition or otherwise, was not derelict in disclosing the information. A continuance was moved that the deposition of said person might be taken to show that Mrs. James was sober and in a normal condition a short time before she received said injuries. No formal motion having been made by way of affidavit, the court denied the motion for a continuance for the purpose stated. The motion was renewed when the assistant district attorney in his argument severely arraigned the defendant for preparing his wife for death through the means of intoxicating liquor. It is so obvious as not to require more than a mention of the proposition that, in circumstances where the means of communication or opportunity for investigation and preparation for a defense and all the other recognized advantages which local contacts afford, are made difficult or inaccessible to the person placed on trial for a crime committed far distant from the place of the trial, every opportunity should be liberally extended to enable such person to meet any surprise evidence or unforeseeable situation arising at the trial, even at the cost of a continuance. The importance of the testimony of the two Colorado persons who offered to testify in rebuttal of the Rogers' evidence as to the sobriety of Mrs. James is given added emphasis by the prominence this court has given the issue in its opinion herein as well as that given to said issue by the prosecution in argument to the jury."

The violation of due process of law guaranteed by the 14th Amendment to the Constitution of the United States in the use of the Colorado evidence is emphasized by two facts, namely: First, the defendant was not apprised of

the fact that such evidence would be placed before the jury until it was actually offered in evidence; and, second, the transaction concerning which the Colorado witnesses testified was entirely collateral and did not tend to prove any issue involving the charge upon which the defendant was on trial.

To show how prejudicial it was for the defendant to have the Colorado evidence introduced it appears from the record that defense counsel stated to the Court that they received information warranting the belief that by taking depositions in Colorado Springs, Colorado, the defense could contradict some of the facts deemed relative to the Colorado evidence.

J. D. Rogers, a prosecution witness, had testified to the apparently intoxicated condition of Mrs. James. The defense moved for a reasonable continuance to give them an opportunity to take the deposition of a witness who had communicated with the defense to the effect that Mrs. James was not intoxicated in Colorado at the time the accident occurred to James' car in Colorado, in 1932 (R. 684).

James testified on *voir dire* examination that he had received an envelope dated January 24, 1936, in the county jail in Los Angeles, containing a letter from a man whom he had seen at the top of Pike's Peak (R. 685).

James testified that during the time his wife was in the hospital she was conscious and remained conscious until the time of her death, and that she had visitors in the hospital. These were important witnesses for the defense in any event, if the defense was required to meet testimony from Colorado, a State more than one thousand miles away from California. One of the witnesses would have been the man at the top of Pike's Peak, whom James and his wife had visited with before the accident occurred. The other witnesses who might have been available were people who visited Mrs. James in Colorado after she recovered con-

sciousness and while she was in the hospital. The testimony of these latter witnesses would have shown that she made no complaint at that time against her husband, but that on the contrary, that his conduct toward her was affectionate and attentive and gave no evidence of even a suspicion that a crime had been attempted. The prosecutor put up a vigorous objection (R. 688). To this objection defense counsel said:

“**JR. CLARK:** If your Honor please, this defendant has not been shown in this case to be a—there is no reason for counsel for the prosecution taking that stand. He has brought into this court evidence of another offense which it is claimed took place more than four years ago, more than a thousand miles from the court room. Isn't the right of the defendant to have a trial by a jury of those in the county, which means in the community. That constitutional right exists by reason of the very great law that if justice be done, the defendant is entitled to bring his witnesses into the courtroom. It is true that counsel advised us of their intention to offer this evidence. It is also true that we were firmly convinced that the evidence could not be gotten under any conceivable set of facts, and being so convinced, we had no reason to anticipate that your Honor's views would differ from ours—

“**THE COURT:** I don't think you are really right on that, Mr. Clark. If you wanted to do it you should have said, 'We have the testimony and we want a continuance to get it.'

“**MR. CLARK:** Well, outside of the burden of a strenuous trial, where counsel have the responsibility of a man's life upon their shoulders, they can do just one thing at one time. They have to concentrate on all the facts that are being produced. Among the three counsel who are representing the defendant here, we could not be expected to go to Colorado Springs. If we had the time and the money perhaps we could do that. Those things we have not, and we had no need for the deposition until we reached this stage of the case. I

will take the broad position that where, as here, an attempt is made to prove the issues of another crime largely separated from the place of trial, and largely separated from the time of trial, that when that attempt is made then the defendant has a right to a reasonable continuance in order to get that evidence which he cannot reasonably get now, and which he should have. He doesn't know from the Indictment hat he was going to have that evidence to get." (R. 688, 689.)

The question here is one of a mere error in the Court's ruling. With this we are not now concerned. The issue is far more fundamental, namely, the right of an accused to be tried only in the community where the crime is alleged to have been committed and where he has the processes of the Court available to him to bring in all matters which may and do aid in his defense; to be notified in advance of the trial of just what he is expected to meet, and to be given the opportunity to be prepared and to meet it. These are fundamentally such clearly announced principles of due process of law that they hardly require citation of authorities.

In *Snyder v. Massachusetts*, 291 U. S. 97, this Court stated that the right of confrontation of witnesses is assumed to be within the scope of the 14th Amendment to the United States Constitution. But how can one avail one's self of the right if no processes of the Court are available to bring in witnesses, and if the state, with its great power and wealth, is able to bring in and does bring in numerous witnesses from another state without affording the defendant the opportunity of meeting the testimony of those witnesses, either by direct confrontation or by a continuance for the purpose of taking a deposition if one could be secured?

This Court has repeatedly held that where process is served outside of a state on a non-resident, such process

is void and fails to bring the person or the subject-matter within the jurisdiction of the Court of another state.

Galpin v. Page, 18 Wall. 350;

Pennoyer v. Neff, 95 U. S. 714.

It is far more essential where life is at stake that the Court attempting to act should have jurisdiction of the subject-matter and that the parties have the processes of the Court available so that they may be confronted with the witnesses and be able to secure evidence that will vindicate them. A denial of these rights is a denial of fundamental and immutable principles of justice. These are doctrines, rights and common justice that inhere in the nature of due process of law and are guaranteed and protected by the 14th Amendment to the Constitution of the United States.

Baldwin v. Hale, 1 Wall. 223, 233;

Twining v. New Jersey, 211 U. S. 78, 110.

The necessity of due notice and an opportunity of being heard are among the immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard. Judgment without notice and opportunity to be heard wants all the attributes of a judicial determination; it is judicial usurpation and oppression and never can be upheld where justice is justly administered. Notice and hearing are preliminary essentials to the passing of an enforceable judgment; they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law.

Powell v. Alabama, 287 U. S. 45, 68 (1932);

Galpin v. Page, 18 Wall. 350, 368, 369 (1874);

Frank v. Mangum, 237 U. S. 309, 340 (1915).

Boundaries of a state determine the state's jurisdiction of the Court.

U. S. v. John, 17 L. Ed. 225, 226.

Crimes are local if committed within the state. It has been held that they must then be tried in the district in which the offense was committed, at least in federal courts.

U. S. v. Dawson, 15 How. 488;

Sixth Amendment to the United States Constitution.

In California jurisdiction of felonies is confined to the county of their commission and the sheriff of the county is required to subpoena any witnesses for either side. (Sections 1326-1331 Penal Code of California.) No such process existed at the time of trial of Lisenba from California into the State of Colorado.

In *Snyder v. Massachusetts*, 291 U. S. 96, 78 L. Ed. 674, 689, Mr. Justice Roberts said:

"In whatsoever proceeding, whether it affect property or liberty of life, the 14th Amendment commands the observation of that standard of common fairness, the failure to observe which would offend men's sense of decencies and proprieties of civilized life. It is fundamental that there can be no due process without reasonable notice and a fair hearing."

Hurtado v. California, 110 U. S. 516, 524, 532, 28 L. Ed. 232, 235, 237, 4 S. Ct. 111, 292;

Iowa Central Rrd. Co. v. Iowa, 40 L. Ed. 467;

Simon v. Craft, 182 U. S. 427, 436, 45 L. Ed. 1165, 1170, 21 S. Ct. 836;

Holmes v. Conway, 241 U. S. 624, 60 L. Ed. 1211, 36 S. Ct. 681;

Hagar v. Reclamation Dist., 111 U. S. 701, 708, 28 L. Ed. 569, 572, 4 S. Ct. 663;

Hooker v. Los Angeles, 188 U. S. 314, 318, 47 L. Ed. 487;

Twining v. New Jersey, 211 U. S. 78, 111, 53 L. Ed. 97, 111, 29 S. Ct. 14.

IV.

The principal testimony against the defendant was that of an alleged accomplice named Charles S. Hope, who received leniency for his testimony. To be sufficient under the laws of California it had to be corroborated as required by Section 1111 of the Penal Code of California, and there was no corroboration. Since the trial the said Charles H. Hope has made affidavits and filed the same in the Superior Court of Los Angeles County, stating that his testimony was obtained by deceit, fraud, collusion and coercion and was entirely false: that he was impelled by force and fear, threats and promises, and that all these facts, including the falsity of his statements, were known to the prosecution and participated in by them. The use of such testimony, thus obtained, and the conviction based thereon, make the entire trial a mere pretense, and is in violation of due process of law and the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States.

Charles H. Hope filed affidavits in the Superior Court which we in turn filed in the Supreme Court of California in this case on petition for rehearing. These affidavits were not denied nor has any averment therein been questioned. They allege fraud on the part of the state. They admit that Hope committed perjury through coercion. They state that his testimony regarding the snakes "was all the bunk," and specifically repudiated it.

The Court took no official action upon these affidavits. The facts therein set forth vitiate the judgment under the principles laid down in *Mooney v. Holohan*, 94 U.S. 102, 73 L. Ed. 794. The use of Hope's testimony under the circumstances constituted a denial of due process of law by the Supreme Court of the state through its agents.

Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97, 29 Sup. Ct. Rep. 14;

Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. Rep. 265;

Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674, 54 Sup. Ct. Rep. 330;

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55;

Mooney v. Holohan, 94 U. S. 102, 79 L. Ed. 347;

Chicago, B. and Q. R. R. v. Chicago, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581;

Carter v. Texas, 177 U. S. 442, 44 L. Ed. 839, 20 Sup. Ct. Rep. 687;

Ex parte Commonwealth of Va., 100 U. S. 339, 25 L. Ed. 676.

Under the circumstances petitioner was denied due process of law in that the trial Court possessed no jurisdiction to enter judgment.

In re Nielsen, 131 U. S. 176, 33 L. Ed. 118;

In re Bonner, 151 U. S. 242, 38 L. Ed. 149, 14 Sup. Ct. Rep. 323;

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55.

Petitioner was denied equal protection of the law.

Smith v. Texas, 85 L. Ed. 106.

The decision of the Supreme Court of California is itself therefore a denial of due process of law and the equal protection of the laws, as to all the points heretofore and hereafter enumerated.

Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674, 54 Sup. Ct. Rep. 330;

Twining v. New Jersey, 211 U. S. 78;

Rogers v. Peck, 199 U. S. 425;

Maxwell v. Dow, 176 U. S. 581;
Hurtado v. California, 110 U. S. 516;
Frank v. Mangum, 237 U. S. 309;
Powell v. Alabama, 287 U. S. 45;
Mooney v. Holohan, 94 U. S. 102, 79 L. Ed. 347;
Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 716;
White v. Texas, 310 U. S. 530, 84 L. Ed. 1342;
Canty v. Alabama, 309 U. S. 629, 84 L. Ed. 988;
Brown v. Mississippi, 297 U. S. 278, 80 L. Ed. 682;
Smith v. Texas, 85 L. Ed. 106.

In *Mooney v. Holohan*, 79 L. Ed. 794, this Court said:

“Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. *Herbert v. Louisiana*, 272 U. S. 312, 316, 317, 71 L. Ed. 270, 273, 47 S. Ct. 103, 48 A. L. R. 1102. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, whether through its legislature, through its courts, or through its executive or administrative of-

ficers.' *Carter v. Texas*, 177 U. S. 442, 447, 44 L. Ed. 839, 841, 20 S. Ct. 687; *Rogers v. Alabama*, 192 U. S. 226, 231, 48 L. Ed. 417, 419, 24 S. Ct. 257; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 233, 234, 41 L. Ed. 979, 983, 984, 17 S. Ct. 581."

V.

The defendant was held incommunicado, without his attorney having been sent for, in custody in a private home, although prior to the alleged confession he requested that his attorney be sent for. This request was denied to him and he was thereafter questioned incessantly, without food and rest, without the knowledge of his attorney and without his attorney being advised of the same. The deprivation of the right of counsel at this and other stages of the proceedings and the use of statements thus obtained constitute a violation of due process of law and the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States.

The denial of the defendant to the right of counsel from the very beginning of his arrest was a denial of due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

The Constitution of California, Article I, Section 8, provides as follows:

"Pleading Guilty Before Magistrate.

"Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. When a defendant is charged with the commission of a felony, by a written complaint subscribed under oath and on file in a court within the county in which the felony is triable, he shall, without unnecessary delay, be taken be-

fore a magistrate of such court. The magistrate shall immediately deliver to him a copy of the complaint, inform him of his right to the aid of counsel, ask him if he desires the aid of counsel, and allow him a reasonable time to send for counsel; and the magistrate must, upon the request of the defendant, require a peace-officer to take a message to any counsel whom the defendant may name, in the city or township in which the court is situated. If the felony charged is not punishable with death, the magistrate shall immediately upon the appearance of counsel for the defendant read the complaint to the defendant and ask him whether he pleads guilty or not guilty to the offense charged therein; thereupon, or at any time thereafter while the charge remains pending before the magistrate and when his counsel is present, the defendant may, with the consent of the magistrate and the district attorney or other counsel for the people, plead guilty to the offense charged or to any other offense, the commission of which is necessarily included in that with which he is charged, or to an attempt to commit the offense charged; and upon such plea of guilty, the magistrate shall immediately commit the defendant to the sheriff and certify the case, including a copy of all proceedings therein and such testimony as in his discretion he may require to be taken, to the superior court, and thereupon such proceedings shall be had as if such defendant had pleaded guilty in such court.

“The foregoing provisions of this section shall be self-executing. The Legislature may prescribe such procedure in cases herein provided for as is not inconsistent herewith. In cases not hereinabove provided for, such proceedings shall be had as are now or may be hereafter prescribed by law, not inconsistent herewith.

“A grand jury shall be drawn and summoned at least once a year in each county.”

The California statutes provide that when an accused is arrested he shall be taken without unnecessary delay before

the nearest or most accessible magistrate in the county in which the arrest is made. (Section 859, California Penal Code.) Upon the request of the defendant the magistrate must require a peace officer to take a message to any counsel in the township, without delay and without fee. Sections 145, 147 and 149 of the California Penal Code provide substantial fines and terms of imprisonment for peace officers who disregard their duties.

Section 825 of the California Penal Code provides as follows:

"Time within which defendant must be taken before magistrate: attorney may visit prisoner: Refusal to permit visit a misdemeanor: Forfeiture and recovery thereof. The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; and after such arrest, any attorney at law entitled to practice in the courts of record of California, may at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of the prisoner so arrested who willfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor. Any officer having a prisoner in charge, who refuses to allow any attorney to visit the prisoner when proper application is made therefor shall forfeit and pay to the party aggrieved the sum of five hundred dollars, to be recovered by action in any court of competent jurisdiction."

The section requiring due process of law under the 14th Amendment to the Constitution of the United States means that due process of law must be accorded by every agency of the state. Under California statutes due process of law requiring that a person be given an attorney immediately after his arrest upon his request is a requirement that was not fulfilled in this case. The denial therefore, of the right

of counsel at this stage of the proceedings, immediately after his arrest, was a denial by the peace officers having charge of him of due process of law. He was entitled under the laws of the State of California to counsel at all times after his arrest. Due process may be denied by any agency of the State acting arbitrarily. (*Mooney v. Holohan*, 294 U. S. 103; *Powell v. Alabama*, 287 U. S. 45).

The record shows that the defendant in this case was held incommunicado for two days and nights in a private home, without being taken before the nearest and most accessible magistrate and without being allowed the counsel of his choice. The officers, as agents for the State acted arbitrarily and in violation of appellant's fundamental rights. Thereafter he was held in the jail, in the "High Power Tank," and was constantly under observation and his counsel visited him only once. The district attorney and the investigating officers were on notice that the defendant had counsel of his own choice at this time and all times thereafter.

Cannon 9 of Canons of Professional Ethics of the American Bar Association, Cases of Legal Ethics, page 574, provides:

"9. Negotiations With Opposite Party. A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

Rule 12, Rules of Professional Conduct, 204 Cal. xciii, states as follows:

"A member of The State Bar shall not communicate with a party represented by counsel upon a subject of

controversy, in the absence and without the consent of such counsel."

Defendant's counsel was entitled to notice of all proceedings and the officers violated the defendant's right to counsel when they removed him from the jail without notice to his counsel or without knowledge of his counsel that this was being done and interrogated him in the absence of counsel. The district attorney had no right to have interrogated the defendant without the presence of his counsel. It was the defendant's right to be left alone and not be contacted or communicated with by opposing counsel, and not to be questioned without the consent or knowledge of his counsel. No rule of conduct is more firmly intrenched than that an attorney shall not communicate with the client of another attorney without such other attorney's knowledge or consent.

The defendant asked the officers to call Russell E. Parsons, another attorney representing him, before he made the alleged confession to the district attorney. This was definitely refused and appellant was told it would take too long to inform Parsons about the case. The people were thus further put on notice that the defendant desired his attorney present to advise him.

The deprivation of the right of counsel at this stage of the proceedings, in accordance with the provisions of California law entitling a defendant to counsel from the very inception of an arrest, was a deprivation of due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

Powell v. Alabama, 287 U. S., 77 L. Ed. 158;

People v. Simpson, 31 Cal. App. (2d) 267.

While this Court has heretofore held that it is a denial of due process of law to deprive a person of right of counsel in his trial, yet here we have a situation in which the de-

defendant is entitled to counsel from the very outset of his arrest, according to the Constitution and laws of the State of California, but was deprived of that right. This deprivation of the right of counsel therefore, at this stage of the proceedings when it would have been of most benefit to him, is equally a denial of due process of law. It would be utterly futile to provide for counsel in the trial of a case if the defendant could not have the right of counsel from the very outset of his arrest so that he might be protected from unlawful assault, improper interrogation, the use of the methods of the thumbscrew, the rack, and the torture chamber, to which he was subjected and by means of which the purported confession was extorted from him.

The denial of the right to have his counsel was a denial of equal protection of the laws, since other prisoners, similarly situated, are granted the right to counsel from the inception of an arrest.

Article I, Section 8, Constitution of California;

Section 825, Penal Code of California;

Maxwell v. Dow, 176 U. S. 581, 44 L. Ed. 597, 20 S. Ct. 448, 494;

Yick Wo v. Hopkins, 30 L. Ed. 200;

Smith v. State of Texas, 85 L. Ed. 106.

"Equal protection of the laws must be given,—not merely promised."

Smith v. State of Texas, 85 L. Ed. 106.

During the trial of the case evidence was introduced in the case regarding an alleged accusatory statement made to the defendant when he was in custody in the county jail in which the district attorney read to him a purported statement of Hope and asked him if he had anything to add to the statement. Defendant was at the time without benefit of counsel, although the district attorney and his deputies knew that he was then represented by counsel. His failure

to reply under such circumstances should not have been used against him (R. 1071. The use of evidence regarding this circumstance was a violation of law guaranteed by the 14th Amendment to the Constitution of the United States.

VI.

The defendant was denied the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States.

In *Yick Wo v. Hopkins*, 30 L. Ed. 200, at 227, this Court said:

“Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.”

California law providing for the right of counsel from the very commencement of one's arrest for crime and that the defendant shall be taken immediately before the nearest and most accessible magistrate and given the benefit of counsel at all times thereafter, and that the defendant thereafter be tried in a due and orderly fashion according to the law of the land, is fair and impartial in appearance. Yet in this case it was applied and administered by the officers of the law, acting as the agents of the State, with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between this defendant and persons in similar circumstances, material to his rights, and denied to him equal justice. Such denial “is still within the prohibition of the Constitution” of the United States, in accordance with the principles above laid down in the *Yick Wo v. Hopkins* case.

It was with an evil eye that the officers took the defendant to a private house next door to his home and showed him dictograph apparatus for its "psychological effect" upon him.

It was with an unequal hand that the seasoned officer in charge of the investigation, Officer Southard, admittedly committed a battery upon this defendant.

It was unjust discrimination to bring in a confession obtained by third degree methods which are forbidden by the laws of the State and the nation and contrary to California's own decision in *People v. Dye*, cited heretofore, and use this confession against him.

It was unjust discrimination to bring in the horrifying spectacle of rattlesnakes, sounding eerily their death knell to this defendant--a sound that reached the passions and prejudices of the jurors as though they had been pierced by the fangs of the snakes themselves.

It was a denial of equal justice to try this defendant upon matters existing in the State of Colorado, of which he had no notice or opportunity to defend.

It was unjust to convict this defendant and to allow the conviction to stand upon testimony admittedly perjured and known by the officers to be perjured.

It was an unfair discrimination to deprive this defendant of his attorney and to question him without the knowledge or consent of such attorney when the State was put upon notice that the defendant had such counsel.

Equal justice requires that all persons in like situations be treated alike. This right is in its nature fundamental in the protection by the government and State of the enjoyment of life and liberty.

In *Caldwell v. State of Texas*, 137 U. S. 692, 34 L. Ed. 816, it was held that no State can deprive particular persons or classes of persons of equal and impartial justice under the law without violating the provisions of the 14th Amendment

to the United States Constitution, and that due process of law, within the meaning of the Constitution, is secured when the laws operate on all alike and no one is subjected to partial or arbitrary exercise of the powers of government.

In *Leeper v. State of Texas*, 139 U. S. 462, 35 L. Ed. 225, the court said:

“that by the Fourteenth Amendment the powers of states in dealing with crime within their borders are not limited, except that no state can deprive particular persons, or class of persons of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process and when secured by the law of the state the constitutional requirement is satisfied, and that due process is so secured by laws operating on all alike, and not *subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.* *Hurtado v. California*, 110 U. S. 516, 535, 28 L. Ed. 232, 238, 4 Sup. Ct. Rep. 111, 292, and cases cited.’ See also, for statement as to due process of law the cases of *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Hagar v. Reclamation Dist.*, No 108, 111 U. S. 701, 707, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663.” (Italics added.)

The powers of government were arbitrarily exercised in the kidnaping of Lisenba and taking him to a private house next door and there detaining him in custody without any warrant or authority of law, and thereafter subjecting him to a course of constant and persistent questioning, physical violence, threats, injuries and suffering.

It was an arbitrary exercise of the powers of the State, through its courts, to permit evidence to be brought in at the expense of the great and powerful State of California from another State more than a thousand miles away, with no opportunity to the accused individual to meet or defend against it.

It was a partial and arbitrary exercise of the powers of government to deprive the accused in this case of the right of counsel at every stage of the proceedings from the time of his arrest.

It was to prevent such arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice that the 14th Amendment was adopted.

Hurtado v. California, 110 U. S. 513, 535, 28 L. Ed. 232.

The late Associate Justice Seawell of the Supreme Court of California said:

"It can be said without fear of overstatement of the fact—if the circumstance is of sufficient importance to merit mention of our judicial records—that in no case which has come to the attention of this Court for review, in its entire judicial existence, has the spectre of weird, ghastly and unnatural wickedness, from first to last, stalked a judicial proceeding in such hideous forms as are set forth in the presentation of the instant case on behalf of the People." (R. 982.)

The essence of due process of law in America is its safeguard—a fair trial.

Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 716.

Conclusion.

The appellant, subjected to the third degree, tried in an atmosphere of hissing, writhing rattlesnakes, with a mass of testimony brought from another State more than one thousand miles away without the benefit of notice or an opportunity to prepare a defense, deprived of counsel and convicted upon perjured testimony, has been denied due process of law guaranteed by the 14th Amendment to the Constitution of the United States. For the same reasons he has

been denied the equal protection of the laws guaranteed by this amendment.

For each of these reasons he has been denied a fair trial and equal and impartial justice under the law.

WHEREFORE, upon each and all of the above grounds he respectfully prays that the judgment be reversed.

Respectfully submitted,

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Attorney for Appellant.

(1998)